APPENDIX

Assignments of Error Filed in the Court of Appeals

1. The Court erred in holding that the libellant, Southwestern Sugar and Molasses Company (Inc.), has any interest in the Barge PETER B which entitled it to maintain a libel for damage to the barge.

2. The Court erred in holding that in the movement of the Barge PETER B with a cargo of molasses therein from Reserve, Louisiana, to Texas City, Texas, the respondent, River Terminals Corporation, was guilty of negligent towage.

3. The Court erred in failing to give effect to Section 3 of the Harter Act and failing to exonerate River Terminals Corporation.

4. The Court erred in failing to give effect to the tariffs of River Terminals Corporation and to the terms and conditions of the bill of lading issued by River Terminals Corporation and delivered to Southwestern Sugar and Molasses Company (Inc.).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,469

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

On Petition for Leave to file a Motion for
Extraordinary Relief.

(June 6, 1958)

Before HUTCHESON, Chief Judge, and BORAH and TUTTLE, Circuit Judges.

PER CURIAM:

Suggesting that by its opinion in *River Terminals Corporation v. Southwestern Sugar & Molasses Co.*, ___ F (2) ____,[13] this court has reached an opinion contrary to the result heretofore reached in this case, movant has filed a petition in this cause for leave to file a motion seeking extraordinary relief, wherein, asking the court "to recall its mandate herein to the district court and, in the court's discretion, either:

"A. consider this case and render a judgment consonant with the one rendered in the

---

[13] 253 F. 2d 922.

River Terminals Corporation—Southwestern Sugar & Molasses Company case, reversing the interlocutory decree of the District Court and ordering this case remanded to the District Court in order to afford the appellees herein reasonable opportunity to seek administrative action before the Interstate Commerce Commission to test the validity of the exculpatory provisions in the tariff of Mississippi Valley Barge Line Company, or otherwise to give full effect to the exculpatory clauses; or, alternatively,

"B. pursuant to Rule 29 of the Court's rules, grant leave to file a petition for rehearing and a brief in support thereof; or, alternatively,

"C. grant leave to mover to file in the District Court a 'bill of review' or 'libel of review'."

Upon consideration thereof, it is ORDERED that, for the reason pointed out in petitioner's motion, that the cause is pending in the district court for final decision and on an appeal therefrom, this court has power to, and will, if then of the opinion it should do so, reverse its former decision and judgment and decide the cause as to it may then seem just and right, *Seagraves v. Wallace*, 69 F (2) 163, and resort to extraordinary relief is unnecessary, the leave to file be, and the same is hereby DENIED, and the clerk is directed to return to the sender the petition for leave to file and the attached and accompanying papers.

MOTION FILED NOV 1 1958

Supreme Court of the United States

OCTOBER TERM, 1958

No. 135

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

May It Please the Court:

T. L. James & Co., Inc., and Brown & Root, Inc., d/b/a Louisiana Bridge Company, and T. L. James & Co., Inc., individually, respectfully move for leave to file a brief as *amici curiae* in this case. The consent of the attorney for Petitioner, Southwestern Sugar and Molasses Co., Inc., has been obtained. The consent of the attorney for the Respondent, River Terminals Corporation, was requested but was refused.

The interest of Movers in this case arises from the fact that they were the successful parties in the cases of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al.*, in the Court of Appeals for the Fifth Circuit Nos. 16,469 & 16,470, decided on May 3, 1957, rehearing denied June 25, 1957, reported at 244 F. 2d 263, in which Writs of Certiorari to this Honorable

Court were refused by order dated November 12, 1957, in the matter entitled *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al.*, No. 446 on the Docket for the October Term 1957, 355 U.S. 871. In these cases the Court of Appeals for the Fifth Circuit decided the question of law involved exactly contrary to its decision in the case of *Southwestern Sugar and Molasses Co., Inc., v. River Terminals Corporation*, under review herein, as is shown by the opinion of the said Court of Appeals dated April 9, 1958, in Case No. 16,699, reported at 253 F. 2d. 922, at page 924. We assume that one of the cogent reasons this Court granted Writs of Certiorari herein was because of such conflicting decisions of the Court of Appeals for the Fifth Circuit.

At the time the decision of the Court of Appeals for the Fifth Circuit in the instant case of *Southwestern Sugar and Molasses Co., Inc.*, was rendered there was an interlocutory decree in admiralty in favor of T. L. James & Co., Inc., et al., against Mississippi Valley Barge Line Company for damages and there remained only a question of proof of the *quantum* of damages. Now in this same T. L. James case, No. 466, October Term 1957, notwithstanding this Court has already denied Writs of Certiorari to Mississippi Valley Barge Line Company, that Company has filed in this Court on or about October 22, 1958, a motion for leave to file an attached petition for rehearing of this Court's order dated November 12, 1957, denying its said petition for Writs of Certiorari therein. Consequently, this is not the ordinary case where an Amicus Curiae has merely a general interest in the legal questions and the decision of a case, for here Mover's opponents are trying to use as a wedge this contrary decision in the Southwestern Sugar and Molasses case to reopen and reverse the favorable decrees in Mover's own cases.

In the instant case, in the Court of Appeals and in its petition to this Court for Writs of Certiorari, Petitioner argued primarily that the release of liability provisions contained in the tariff of the River Terminals Corporation, Respondent herein, which are similar to the release of liability provisions in the tariff of the Mississippi Valley Barge Line Company involved and declared invalid by the Court of Appeals for the Fifth Circuit in the T. L. James & Co., Inc., et al., suit, *supra*, were void and illegal under the decision of this Court in the case of *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct., 629 (1955). However, Petitioner failed to stress the importance and controlling effect of the decision in *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 64 S. Ct. 768 (1944), where, taking cognizance of the pertinent language of the Interstate Commerce Act (Transportation Act of 1940), 49 U.S.C. Sec. 920(d), itself, this Court held that, although certificated companies engaged in what was towage were subject to regulation under the Act, it was not the intent of Congress to disturb the rules governing liability of vessels or their owners for loss or damage to vessels in tow or cargo laden thereon.

Petitioner further failed to stress the fact that the case relied upon by the Court of Appeals for the Fifth Circuit in its decision under review here of *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161 (1956) and similar decisions of this Court, involved questions concerning tariff classifications and rates and did not involve similar release of liability agreements in tariffs filed with the Interstate Commerce Commission and which agreements on their face conflict with such decisions of this Court as *Bisso v. Inland Waterways Corporation, supra.* Petitioner likewise failed to argue and to stress that this Court has repeatedly

held it has authority, and is the proper tribunal, to construe and declare invalid provisions contained in tariffs filed with the Interstate Commerce Commission without the necessity of the litigant resorting first for a remedy to the Commission. See, *St. Louis, Iron Mountain & Southern Railway Co. v. Hasty & Sons*, 255 U.S. 252, 41 S. Ct. 269 (1921); *Great Northern Railway Company v. Merchants Elevator Company*, 259 U.S. 285, 42 S. Ct. 477 (1922), and the expression of this Court at page 69 in *United States v. Western Pacific Railroad Company, supra.*

Since it is likely that Petitioner may fail to raise and stress these questions in its brief and argument on the merits before this Court, it is believed that the brief which Movers are requesting permission to file as Amici Curiae will contain a more complete argument thereon. If this argument is accepted it will be dispositive finally of both of these cases decided by the Court of Appeals for the Fifth Circuit, just as it was originally accepted and disposed of Movers' cases of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al., supra.*

Respectfully submitted,

JOHN W. SIMS,
420 Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Movers.

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS,
JAS. HY. BRUNS,
CHARLES E. DUNBAR, III,
Of Counsel.

Office-Supreme Court, U.S.
FILED
NOV 12 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

OBJECTION OF RIVER TERMINALS CORPORATION, RESPONDENT, TO MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

CARL G. STEARNS,
Bank of the Southwest Building,
Houston, Texas.

SELIM B. LEMLE,
National Bank of Commerce
Building,
New Orleans, Louisiana.
Proctors for Respondent.

Of Counsel:
FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI,
Bank of the Southwest Building,
Houston, Texas.

LEMLE & KELLEHER,
National Bank of Commerce Building,
New Orleans, Louisiana.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

OBJECTION OF RIVER TERMINALS CORPORATION, RESPONDENT, TO MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

May It Please The Court:

Respondent, River Terminals Corporation, is filing this objection to the motion of T. L. James & Co., Inc., et al., for leave to file a brief as *amici curiae* in this case in order to reiterate and record the reason which it has heretofore given to movants' attorney for withholding its consent to such filing.

The movants here are the respondents in th matter entitled *Mississippi Valley Barge Line Company, Petitioner, v. T. L. James & Co., Inc., et al., Respondents*, No. 446, October Term, 1957, of the docket of this Court, which is now pending on motion for leave to file a petition for rehearing of Your Honors' denial of a petition for writ of certiorari to the United States Court of

Appeals for the Fifth Circuit. This rehearing is being sought on the ground that both that case and the one at bar present similar and related questions of law which have been determined contradictorily by the Court of Appeals. That such a situation exists is unequivocally and unreservedly stated by the attorney for movants in their motion for leave to file a brief as *amici curiae* herein, and yet they are opposing the motion for leave to file a petition for rehearing and the petition for rehearing in *Mississippi Valley Barge Line Company—T. L. James & Co., Inc., et al.* In short, the attorney for movants wants to be heard on the questions involved in and material to those cases in the case at bar, but not in his own cases. He wants to fight his battle on somebody else's battleground, but not on his own battleground.

We have advised the attorney for movants that we consider it entirely unreasonable for him to ask consent to file a brief for *amici curiae* herein to discuss the legal questions involved in *Mississippi Valley Barge Line Company—T. L. James & Co., Inc., et al.*, while at the same time opposing having Your Honors review those cases. We reiterate that objection and record it herewith.

Respectfully submitted,

CARL G. STEARNS,
Bank of the Southwest Building,
Houston, Texas.

s/. SELIM B. LEMLE,
National Bank of Commerce Building,
New Orleans, Louisiana.
Proctors for Respondent.

Of Counsel:
FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI,
Bank of the Southwest Building,
Houston, Texas.

LEMLE & KELLEHER,
National Bank of Commerce Building,
New Orleans, Louisiana.

3

SUPREME COURT, U.S.
RECEIVED
JAN 3 1959
SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON BEHALF OF SOUTHWESTERN SUGAR AND MOLASSES CO., INC., PETITIONER

AMOS L. PONDER, JR.
P. M. FLANAGAN
OF COUNSEL

CLEM H. SEHRT
PROCTOR FOR PETITIONER
Pere Marquette Building
New Orleans, La.

OPINIONS BELOW

The findings of fact and conclusions of law are in the record (R 261). The opinion of the Court of Appeals is in the record (R 269).

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is based on 28 U. S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1.

Whether River Terminals Corporation can escape liability for its negligence because of the tariff filed with the Interstate Commerce Commission containing the following provisions:

> "When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise."

2.

Whether a tower can incorporate in its tariff an exculpatory clause releasing it from liability and from the consequences of its own negligence when this Court has held such release from negligence clauses as void and against

public policy in Bisso vs. Inland Waterways Corporation 349 U.S. 85, 75 S. Ct. 629 (1955).

3.

Whether the Courts and not the Interstate Commerce Commission, as Respondent contends, are the proper forums for determining whether release from liability clauses are void as contrary to public policy.

STATEMENT OF THE CASE

Petitioner instituted suit in the United States District Court for the Eastern District of Louisiana against River Terminals Corporation for damages to the Barge Peter B and loss of a cargo of molasses laden therein. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of River Terminals Corporation in navigation or management of the tow (R 367).

The Court of Appeals did not consider the case on the merits as Respondent had asserted a defense, which they held, if available to Respondent, would make it unnecessary to consider the case on the merits. The defense was that Respondent was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, U.S.C.A. 901 et. seg., and was requested to, and did, file tariff schedules with the Interstate Commerce Commission and that the tariff applicable to this movement relieved it from all liability for negligence or otherwise, the pertinent part as follows:

> "When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise."

The Court of Appeals went on to say:

> "As to whether the quoted provision of the tariff is void as against Public Policy we must at once recognize that in the recent case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263, we held such a provision void and of no effect."

The Court stated that in the Mississippi Valley case, supra, the issues were identical to this case. This Court in the Mississippi Valley case held that this identical provision was void and of no effect citing Bisso vs. Inland Waterways Corp., 349 U.S. 85, stating as follows:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the brief of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

In the instant case the Court stated that if they had incorrectly stated the law previously it was their duty to proceed in this cause as they believed the law required.

The Court of Appeal reversed and remanded the trial court in order to afford the appellee reasonable opportunity to seek administrative action before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

Briefly the facts that were developed at the time of trial were as follows:

Between September 17 and September 22, 1944, the loaded steel molasses tank barge called the PETER B was towed by respondent's[1] tugs from Reserve, La. to libellant's[2] terminal at Texas City, Texas, under an oral towage contract.

The PETER B consistently lost trim during the course of the towage because of a leak in her No. 2 forward tank, starboard side, with the result that at the time she was moored at Southwestern's terminal, Texas City, Texas, on the night of September 22-23, 1944, the barge had completely lost trim, her leading starboard corner being at the water's edge.

The PETER B subsequently sank (under the circumstances developed at the trial) during the early morning hours of Sunday, September 24, 1944. As a result of the sinking, her molasses cargo became a total loss, except for the salvage of a relatively small amount. The barge was subsequently raised, repaired and returned to service.

---

[1]Hereafter termed "R.T.C.".
[2]Hereafter termed "SOUTHWESTERN."

The libel herein was filed by Southwestern against R.T.C. to recover on its own behalf, as owner of the cargo, and as bailee or charterer on behalf of International Transportation Corporation,[3] owner of the PETER B to recover for the damage sustained by both the cargo and the barge. The amount claimed in the libel is $44,000.14, together with the interest, etc.

Southwestern asserts that the loss and damage was the proximate result of fault on the part of R.T.C. (and the towing tugs) in that, notwithstanding specific knowledge that the barge was leaking:

(1) It failed to sound and pump the barge when her loss of freeboard forward, while en route from Reserve, La., made it apparent that she was taking water in either the forward rake or the No. 2 cargo tank, or both;

(2) It moored the PETER B forward end out, i.e., with the forward starboard corner (which was at the water line) exposed to the wind and waves, and the wash of vessels passing across the end of the slip;

(3) It moored the PETER B in a deep water slipway, in exposed condition, when the barge could and should have been moored in shallow water or beached on a flat (Snake Island) a relatively short distance off the end of the slipway; and

(4) By assuring a clerical employee of Southwestern, who was totally unfamiliar with marine equipment, that

---

[3]Hereafter termed "INTERNATIONAL."

the PETER B was in safe condition and required no attention when it knew in fact that the barge, at the time it was moored on the night of September 22-23, 1944 and thereafter, was in a dangerous, leaking and exposed condition, and when it also knew that there was no person available at the Southwestern terminal capable of exercising any judgment as to the actual condition of such barge.

By its answer, R. T. C. asserts, in substance, that when the PETER B was berthed at Texas City, it was not out of trim nor in a dangerous or leaky condition and that the sinking therefore was not the result of any negligence on its part. It affirmatively alleges that, notwithstanding the fact that the towage contract was verbal and that the bill of lading issued by R. T. C. contained no reference thereto, the towage of the barge and cargo was subject to the provisions of a certain tariff filed with the Interstate Commerce Commission, Washington, D. C., which tariff, among other things, provided:

> "When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the carrier * * * such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise * * *. Presentation of a shipment in a barge furnished by the shipper * * * shall constitute a guarantee * * * that the barge is seaworthy." (Ans. Art. 24)

Two witnesses having knowledge of the facts were produced by Southwestern and testified at the trial, namely,

SUBJECT INDEX

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented for Review	2
IV. Statement of the Case	3
V. Argument	19
VI. Conclusion	42
Certificate	44

TABLE OF AUTHORITIES

Cases Cited

Bisso vs. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955)	3
Conners-Standard Marine Corp. vs. Marine Fuel Transfer Corp. (E.D.N.Y.) 1955 A.M.C. 1759	19
Cornell Steamboat Co. Contract Carrier Application, 250 I.C.C. 301 (1942)	32
Cornell Steamboat Co. vs. United States, 53 Fed. Supp. 349 (D.C.N.Y.) (1943)	34
Cornell Steamboat Co. vs. United States, 321 U.S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (1944)	35
Curtis Bay Towing Co. of Va., Inc., vs. Southern Lighterage Corp., (4 CCA) 200 F. 2d 33	26
Dwyer Lighterage Co. vs. Christie Scow Corp. (E.D.N.Y.) 96 Fed. Supp. 903	28

AUTHORITIES — *(Continued)*

Page

Foss Launch & Tug Co. vs. The Kukkui (N.D. Cal.) 130 Fed. Supp. 180 28

F. E. Grauwiller Trans. Co., Inc. vs. Exner Sand & Gravel Corp. (2 CCA) 162 F. 2d 90 25

George Leary, Jr. vs. The City of New York, (E.D.N.Y.) 1945 A.M.C. 598 22

Henry Du Bois Sons Co. vs. Penn. R. Co., (2d Cir.) 47 F. 2d 172 22

Howard vs. Dobbins-Trinity Coal Co. Inc., (2 CCA) 111 F. 2d 571 19

Ideal Cement Co. v. The Tickfaw, 143 Fed. Supp. 904 (E.D. La.) (1956) 38

In Re Wright & Cobb Lighterage Co., Inc., (S.D.N.Y.) 42 Fed. 2d 480 20

Mississippi Valley Barge Line Company vs. T. L. James & Co., Inc., et al, 5 Cir. 244 F. 2d. 263 42

Moran Transportation Corp. vs. Lehegh Valley R.R. Co. et al, (S.D.N.Y.) 126 F. Supp. 122. 19

O'Donnell Transportation Corporation, Inc. vs. M. & J. Tracy (2 CCA) 150 Fed. 2d 735 20

Petition of Reliance Marine Trans. Co., 89 Fed. Supp. 272 (D.C. Conn.) (1950) 37

Seaboard Sand & Gravel Corp. vs. Moran Towing Corp., 154 Fed. 2d 399 19

The Frank A. Smith Norris Grain Co. vs. Ryan et al, (E.D.N.Y.) 8 Fed. Supp. 134 19

AUTHORITIES — *(Continued)*

	Page
The Guiding Star vs. Jennie F., (E.D.N.Y.) 1929 A.M.C. 155	22
The Mack et al (E.D.N.Y.) 18 Fed. Supp. 69	28
The New York (E.D.N.Y.) 93 Fed. 495, 498	22
The W. C. Block, The Wilson P. Foss (2 CCA) 71 Fed. 2d 682	20
Thorne, Neale & Co., Inc. vs. Reading Co., (2 CCA) 87 F. 2d 694	24
United States vs. Shea, 152 U.S. 178, 186	20

Statutory Authorities

Harter Act, Sec. III. 46 U.S.C. 190-196	35
Transportation Act of 1940, 49 U.S.C. Sec. 901 et seq:	35

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

The United States District Court for the Eastern District of Louisiana entered an interlocutory decree decreeing River Terminals Corporation liable as a tower to Southwestern Sugar and Molasses Co., Inc., for damages to the Barge, Peter B, and a cargo of molasses laden therein; on appeal the United States Court of Appeal for the Fifth Circuit reversed the decree of the lower Court and remanded the case for further proceedings; an application for a Writ of Certiorari was filed by petitioner on July 7, 1958 and granted on October 13, 1958.

During September, 1944, and for some time prior thereto, Southwestern operated the barge PETER B under charter from International, the terms of hire being for an indefinite period at a stipulated rate, with Southwestern obligated to provide maintenance and such repairs as may be required during the course of the charter.

In the fourth paragraph of the libel, which was affirmed under oath by A. I. Kaplan, President, it was alleged that; libellant as charterer and bailee of said barge was required to keep the barge in repair, and at the termination of said charter party to return the barge to its owner in the same good order and condition as received, ordinary wear and tear excepted, and to pay for any damages sustained by said barge PETER B while used by the charterer under said charter party.

R. T. C. addressed interrogatories to libellant which were answered by Mr. A. I. Kaplan (R 44) as follows:

> "He does know that the barge was under charter to libellant from the International Transportation Corporation during the month of September, 1944, and long prior thereto, as alleged in the libel and to which he affirmed under oath in September, 1945."

Libellant has shown that it did have an interest in the barge PETER B by this and the testimony of Mr. Frieler at the time of trial. (R 65, 66)

Mr. L. H. Frieler, Manager of libellant's terminal, and Mrs. W. White, former clerical employee of Southwestern. The testimony of other witnesses for libellant was taken by deposition.

Testimony on behalf of respondent was entirely by deposition.

The bill of lading covering the transportation, the dimensions and physical details of the PETER B and of the towing tugs, and other pertinent matters were either stipulated during the pendency of the suit or at the trial.

In 1944 and for some years prior thereto, Southwestern owned and operated a molasses terminal at Texas City, Texas, used for the purpose of berthing barges, a deep water slip, owned by the Port of Texas City, known as "Pier C." The slipway opened up on the main ship channel between Galveston and Texas City, Texas.

The PETER B may be briefly described as a steel tank barge approximately 175 ft. long, 26 ft. wide, and 11 ft. deep. The barge has eleven tanks, three of which were small round cylindrical tanks set in rotation in the center of the barge, the other eight tanks being rectangular in shape — four being located on each side of the barge and being numbered from forward to aft. The No. 1 tank thus was the forward tank on the port side and the No. 2 tank the forward tank on the starboard side of the barge immediately aft of the rake. The barge had two dry compartments or rakes, one forward and one aft, the aft rake containing a small pump house equipped with a gasoline-driven cargo pump.

The PETER B, while in Southwestern's custody, had been certified for use in the molasses trade and was operated exclusively in the molasses trade, having made twelve or thirteen trips with molasses between Reserve, La. and Texas City, Texas, via the Intracostal waterway. R. T. C. towed the barge on each occasion prior to the trip in question.

On such previous trips, the vessel, when fully loaded, carried about 155,000 gallons of molasses and, while a greater quantity of molasses was carried in the cargo tanks aft and midship, approximately 5-1/2 feet of cargo was carried in the forward tanks No. 1 and 2. Fully loaded, the PETER B had a normal freeboard of approximately 3 ft. 2 in. forward and 2 ft. 6 in. aft.

On Saturday, September 16, 1944, the PETER B, having been towed light from Texas City, by R. T. C., was tendered to the Godchaux Sugar Refinery, Reserve, La. for the loading of a further cargo of blackstrap molasses. Loading was commenced on that day under the supervision of Mr. L. H. Frieler, Manager of Southwestern's terminal at Texas City, who had proceeded to Reserve, La. for such purpose. Loading proceeded in the usual manner, namely, cargo was pumped into the vessel's cylindrical tanks and into the rectangular tanks from aft to forward. As loading was nearing completion, and when about one foot of cargo had been loaded into the two forward tanks, namely, Tank No. 1 and tank No. 2 respectively, a cracking or sizzling noise was heard coming from the No. 2 cargo tank.

Loading was immediately stopped and inspection made to determine the cause of the noise. A crack variously estimat-

ed to be from 6 to 8 inches in length and located approximately 80-1/2 inches from the top of the cargo tank, was found in the No. 2 cargo tank. Further cargo was therefore placed into either the No. 1 or the No. 2 tanks of the vessel. Gauge readings, subsequently taken jointly with the shipper, disclosed the PETER B to have loaded approximately 140,158 gallons (as distinguished from her normal cargo of approximately 155,000 gallons) on board.

Frieler tried to notify R. T. C.'s New Orleans office about the leak in the No. 2 tank but was unable to do so since it was late Saturday evening (September 16) when the incident occurred and the R. T. C. office was apparently closed. Frieler thereupon returned to New Orleans, and the following morning (Sunday), September 17, 1944, again attempted to call R. T. C. but was again unsuccessful. He therefore returned to Reserve, La. and found that the barge had been towed out from the dock early in the morning and prior to his arrival. (R 79). Being concerned about the leak, Frieler then proceeded to Houston, Texas (rather than to Texas City), stayed over-night, and the following morning, Monday, September 17, called in person at the R. T. C. office in Houston (R 82, 83).

Frieler conferred with Mr. Hinkle, General Agent of R. T. C. at Houston, Texas, advising Mr. Hinkle as to the leak in the No. 2 tank of the barge and of his (Frieler's) concern that the towing tugs would keep the barge under close observation during the course of the trip to Texas City. Hinkle told Frieler not to be alarmed and that there was no danger since the tugs had pumps aboard and, further, that in any event, the tow could not be made up at Harvey, La. for a day or two and that the R. T. C. New Or-

leans office would be advised and Frieler kept informed of any unusual incident en route.

Hinkle confirmed the visit and advices by Frieler, although he preferred to base lack of alarm as to the condition of the barge on other grounds, viz:

> "A. I understood the object of his visit was for me to determine whether the barge had become involved in any accident while in our possession.
>
> Q. But also to give you information about the leak?
>
> A. Well, yes, I would say that that was part of the reason that he came.
>
> Q. Do you know now, today, any reason why you should have contacted anyone about a leak in a cargo tank in that barge, from your standpoint as an operating man?
>
> A. No, sir. A leak in a cargo tank is not a matter of any concern, because, as I say, that is what the tank is for, for cargo, whether it be molasses or water or kerosene or petroleum products of any kind." (Dep. Hinkle. R 244)

Frieler thereupon also notified Capt. R. L. Wynne, a surveyor with office at Houston, Texas, as to the leak which had occurred in the No. 2 tank and the fact of possible damage to the cargo. Capt. Wynne requested Frieler not to have the barge discharged except in his presence and a tentative arrangement was made for Capt. Wynne to meet with Frieler and survey the barge and the cargo on Monday, September 25, 1944. A letter from Capt. Wynne

to Frieler confirming this arrangement was thereafter received by Southwestern. (R 249)

On September 21, 1944, i.e., three days after Frieler's advices to both Hinkle and Capt. Wynne of the condition of the barge, he received instructions to proceed to Corpus Christi and McAllen, Texas, in connection with other business of his company. Prior to leaving for Corpus Christi, however, Frieler telephoned Hinkle and again inquired whether he had heard anything as to the condition of the barge. Hinkle stated that he had not and repeated that there was nothing to be alarmed about because the tugs had pumps aboard and would keep the barge under constant observation. Frieler thereupon called Capt. Wynne who came down to Southwestern's terminal and discussed the matter again with Frieler in the presence of Mrs. White (then Miss Wertenberger). Frieler advised Capt. Wynne that he had talked again with Mr. Hinkle and that apparently the barge was all right, whereupon Capt. Wynne again stated that the barge was not to be discharged unless he (Wynne) was in attendance Frieler thereupon, in Wynne's presence, so stated to Mrs. White and departed for Corpus Christi and McAllen the same afternoon of September 21, 1944.

It appears from the depositions subsequently taken on behalf of R. T. C. and from answers to interrogatories made herein that, in making the trip from Reserve, La. to Texas City, Texas, the tow traversed the following route, viz., the Mississippi River from Reserve, La. to the Harvey Locks at Harvey, La.; through the Harvey Locks; then via the Intra-costal waterway through the Vermillion Locks to Port Arthur, Texas; thence to Galveston Bay, Texas, and

across Galveston Bay to Texas City, Texas. (Ans. R 19, 20). It further appears that the PETER B was towed from Reserve, La. to Harvey, La. by the tug JOHN M; from Harvey, La., to Port Arthur, Texas, by the tug SAMBO; and from Port Arthur, Texas, to Texas City, Texas, by the tug DOTTIE D. (R 19, 20)

The PETER B apparently maintained her trim through the Harvey Locks, and the lock tender's record disclosing her mesne draft then to be 6 ft. On arrival at the Vermillion Locks, however, it was evident that the barge was taking water, since the lock tender's report at such place disclosed her mesne draft to be 8 ft.

In any event, when the tow arrived at Port Arthur, Texas, in the charge of the tug SAMBO, the PETER B was badly out of trim, her forward starboard corner having a freeboard of not more than 8 to 9 inches, her freeboard aft remaining approximately the same as when the barge left Reserve, La., i. e., about 2 ft. 5 inches. (R 224, 225, 226)

It is claimed by the captain of the DOTTIE D (Allemand) that because of her bad trim he went aboard the PETER B, removed the manhole covers by unscrewing the bolts and releasing the dogs with his hands, and inspected both the forward and after dry rakes and found both to be empty. (Dep. Allemand R 225). No attempt was made to inspect the No. 2 forward cargo tank or any of the cargo tanks, notwithstanding the fact that the starboard forward corner of the barge had lost most of its freeboard. (Dep. Allemand R 225) Notwithstanding the fact that previous knowledge had been given to Hinkle by Frieler as to the

leak in the No. 2 tank, Allemand did not know the barge had a leak in the No. 2 cargo tank.

"Q. Did you know or had anybody told you that the barge had a hole in her?

A. I didn't know anything about it. Nobody never mentioned anything about it to me."

(Dep. Allemand, R 225)

The tug DOTTIE D thereupon broke the PETER B out of tow, turned her around, made up to the forward end of the barge, and proceeded to push her stern-first across Galveston Bay from Port Arthur, to Texas City, a distance of 60 to 65 miles across open water at a speed in excess of 7 miles per hour. (Dep. Allemand, R 225, 226). This was the first time Allemand had ever seen the PETER B in such condition, and the first time he had towed her on numerous prior occasions. (Dep. Allemand, R 227, 228)

Allemand also claimed that during the course of traversing Galveston Bay, at an average speed of 7 miles an hour, he again boarded the PETER B, again unscrewed the manhole covers to the rakes and again checked them to make sure that they were free of water.

The implausibility of the latter claim seems apparent, when viewed in the light of Frieler's testimony that on previous occasions when the manhole covers leading to the rakes were opened, it was necessary to use a long handled wrench, and the surveyor's reports (introduced in evidence by stipulation at the trial). (R 111, 252)

The Barge PETER B arrived at "Pier 0," Texas City, about midnight, September 22, 1944, and was first berthed across the "Tee" of the Pier outside the slip, the reason being unknown. During the course of the night, for reasons also not explained the DOTTIE DEE pushed the barge into the slip, stern-first, and made her fast, starside to the dock, bow out, in such manner that the forward starboard corner of the barge was next to the Pier. Nobody at the Southwestern terminal was notified of the arrival of the barge.

About 8 o'clock the following morning, Saturday, September 23, 1944, Mrs. White, a clerical assistant to Frieler, was advised by Garcia, a handyman at the plant, that the forward starboard corner of the barge was at the water line and that waves were washing over the deck at that place. Mrs. White went down and viewed the barge and then immediately placed calls both for Capt. Wynne and for the R. T. C. office at Houston. The call went through to the R. T. C. office first, whereupon Mrs. White advised Capt. Stovall of R. T. C., who was in charge of the R. T. C. office at Houston, as to the condition of the barge and inquired specifically whether the barge was in any danger, since Frieler was not available and Capt. Wynne wanted to see the barge prior to the time her cargo was discharged. (R 120, 121, 122, 123, 124)

Mrs. White was quite specific in her testimony at the trial, that she told Capt. Stovall the forward right hand corner of the barge was at the water line, and that waves were washing over it; that she was not familiar with floating equipment; that she had never seen the barge in that condition; that the office would close at 12 o'clock noon; and that she had called because, if there was any

danger, a tug should pump the barge out or otherwise care for it.

Capt. Stovall advised Mrs. White that the master of the tug was then in his office and, after interrogating the master, stated that the rakes of the barge had been examined by the master (Allemand) at the time the PETER B was moored in the slip, and were found dry, and that the barge was in the same condition as when the DOTTIE D took her in tow at Port Arthur. Capt. Stovall assured Mrs. White that there was nothing to be concerned about and that the barge was in no danger of sinking.

Mrs. White, nevertheless, kept her telephone call in for Capt. Wynne's residence at Dickinson, Texas, and succeeded in reaching Capt. Wynne later during the morning of September 23, 1944. She reported to Capt. Wynne what Capt. Stovall had stated; told Capt. Wynne the condition of the barge and inquired whether he would not consider it advisable to go down and look at it. Capt. Wynne concurred with Capt. Stovall that there was no immediate concern and that he would be down on Monday morning (September 25, 1944), as previously arranged with Frieler.

Mrs. White, in reliance upon such advices, did nothing further and left the plant at noon time. The following morning (Sunday, September 24) at about 8 A.M., she received a telephone call from someone at the Pier that the barge was sinking. She immediately went to the plant and on arrival found that the PETER B had sunk by the head in about 30 feet of water, the only portion of the barge above the water being the after cargo tanks No. 10 and No. 11 and the after rake. As Mrs. White put it, only the last

two valves were visible when she saw the barge. She then immediately called Capt. Stovall and Capt. Wynne and, after some delay, succeeded in reaching Capt. Stovall. When told of the condition of the barge, Capt. Stovall then advised Mrs. White to start the pumping on the barge and to keep Capt. Wynne informed. He also agreed to get what equipment he could and move to the barge in an attempt to keep her from further sinking. R. T. C. was apparently unable to get any equipment over to the barge, nor could Mrs. White. Some time later, Capt. Wynne telephoned and when advised of the condition, came down to the terminal, arriving from his residence at Dickinson, Texas, during the course of the late afternoon.

All efforts to pump out the barge or to create enough buoyancy to raise her forward end were unavailing and, although a small amount of cargo was pumped out of the after tanks, only a relatively small amount of salvage, estimated to be between 5,000 and 9,000 gallons, was realized.

The PETER B was subsequently raised, towed to the Houston Iron Works, surveyed and repaired at a cost of approximately $6,380.

During the course of survey, heavy scale was removed from the shell in the way of the No. 2 tank, disclosing numerous small pin holes. One of these pin holes was enlarged several inches in diameter with a chipping hammer, after which photographs of that area were taken by R. T. C. over vigorous protests of Frieler.

ARGUMENT

I.

An oral barge charter requiring the charterer to operate, maintain and repair it at its own expense, is a demise charter. This appears to be so well settled as a matter of law as not to be subject to serious question.

MORAN TRANSPORTATION CORP. V. LEHIGH VALLEY R. R. CO. ET AL. (S.D.N.Y.), 126 Fed. Supp. 122;

HOWARD V. DOBBINS-TRINITY COAL CO. INC. (2 CCA) 111 Fed. (2d) 571;

CONNERS-STANDARD MARINE CORP. ETC. V. MARINE FUEL TRANSFER CORP. ET AL. (E.D.N.Y.) 1955 A.M.C. 1759 (not otherwise reported);

SEABOARD SAND & GRAVEL CORP. V. MORAN TOWING CORPORATION, 154 Fed. (2d) 399;

O'DONNELL TRANSPORTATION CO. INC. V. M. & J. TRACY (2 CCA) 150 Fed. (2d) 735;

THE FRANK A. SMITH. NORRIS GRAIN CO. V. RYAN ET AL. (E.D.N.Y.) 8 Fed. Supp. 134.

II.

Southwestern was therefore owner of the PETER B *pro hac vice.*

CONNERS-STANDARD MARINE CORPQRATION ETC. V. MARINE FUEL TRANSFER CORPORA-

TION ET AL. (E.D.N.Y.) 1955 A.M.C. 1759 (not otherwise reported);
UNITED STATES V. SHEA, 152 U.S. 178, 186;
THE W. C. BLOCK, THE WILSON P. FOSS, (2 CCA) 71 Fed. (2d) 682;
IN RE. WRIGHT & COBB LIGHTERAGE CO. INC., (S.D.N.Y.) 42 Fed. (2d) 480.

and, as such, became liable primarily for any damage sustained by the barge while in its possession as charterer, for the acts of anyone to whom it entrusted the barge or permitted to exercise dominion over it, including the acts of negligence of a tow boat company.

O'DONNELL TRANSPORTATION CO. INC. V. M. & J. TRACY, INC. (2 CCA) 150 Fed. (2d) 735;
CONNERS-STANDARD MARINE CORP. ETC. V. MARINE FUEL TRANSFER CORPORATION ET AL. (E.D.N.Y.) 1955 A.M.C. 1759 (not otherwise reported.)

In *O'DONNELL TRANSPORTATION CO. INC. v. M. & J. TRACY, INC.* (2 CCA) 150 Fed. (2d) 735, the Court of Appeals, per A. N. Hand, C. J., said at page 737:

> " * * * It has long been held that a (demise) charterer of barge who hires a tug to tow it is liable for the negligence of the tug. * * * " (parenthesis supplied)

In *CONNERS-STANDARD MARINE CORP. ETC. v. MARINE FUEL TRANSFER CORP. ET AL.* (E.D.N.Y.)

1955 A.M.C. 1759, Abruzzo, D. J., painstakingly collected the authorities, saying at page 1761:

> "As said by the Circuit Court for this Circuit in O'Donnell Transp. Co. vs. M. & J. Tracy, supra, in affirming a decree of this Court (1945 A.M.C. p. 966, 150 F. (2d) p. 737):
>
> > 'Liability is imposed upon charterers upon the theory that they should at all times care for the barge while she is under charter to them and that they are under a duty which may not be delegated to others. * * * '"

III.

Southwestern could therefore sue as it did herein, in its own name as owner of the cargo and as owner pro hac vice or as bailee for damage sustained by the PETER B as a result of negligence of R. T. C. and/or its tugs.

THE W. C. BLOCK, THE WILSON P. FOSS (2 CCA) 71 Fed. (2d) 682:

> " * * * For centuries it has been the settled rule, both at common law and in the admiralty, that either the bailor (in the present case, the buyer, McNulty), or the bailee (the libellant), might sue the tort feasor for destruction of the bailed goods. * * * " Swan, C. J., (page 683).

GEORGE LEARY, JR. V. THE CITY OF NEW YORK (E.D.N.Y.) 1945 A.M.C. 598 (not otherwise reported):

"The respondent now urges preliminarily that it should be relieved of liability because the libellant was itself merely a charterer. But manifestly the libellant is entitled to maintain suit, since it is a bailee." (p. 599)

THE GUIDING STAR v. JENNIE F. (E.D.N.Y.) 1929 A.M.C. 155 (not otherwise reported); *THE NEW YORK* (E.D.N.Y.) 93 Fed. 495, 498.

IV.

R. T. C., having been placed on notice of the leaking condition of the PETER B, was under the duty to exercise a high degree of care to protect the barge while in its custody and to so moor her that she was in no danger of sinking, or to stand-by and pump as required to prevent her from later sinking, until performance of such duty was excused.

In *HENRY DU BOIS SONS CO. v. PENNSYLVANIA R. CO.* (2d Cir.) 47 F. (2d) 172, 174, the court said:

"When the Mercer took her out of the tow to moor because of her leaking condition, the tug was bound to exercise the skill and care a prudent navigator would employ in like circumstances, for the bailment continued until the service contracted for was performed *or performance excused.* Doherty v. Penn. R. Co. (C.C.A.) 269 F. 959;

The W. H. Baldwin (C.C.A.) 271 F. 411; Maryland Transportation Co. v. Dempsey (C.C.A.) 279 F. 94. The duty the Mercer owed the Margaret G. was not fulfilled by tying her up and leaving her to sink unless reasonable care would not have prevented her sinking at all. So, before we need consider the choice of a berth, we may well inquire whether the Mercer was justified in abandoning the coal boat at any berth.

"*Certainly, abandonment to sink at the pier, before all reasonable efforts to keep her afloat were exhausted, was a breach of duty imposed by law,* The Joseph F. Clinton (C.C.A.) 250 F. 977, and the burden is on the tug to show that no reasonable effort on her part would have kept the coal boat afloat, Appeal of Cahill (C.C.A.) 124 F. 63. As to that the record is silent. We know, however, that water was gaining on the coal boat's pump. This plainly indicated her sinking unless aid was obtained. We know her pump was in the bow, and, of course, grounding her bow had no effect to prevent whatever surplus water came in from running aft, no matter where the leak was located. This put it beyond the reach of the pump, and the stern would inevitably get lower and lower. We know that she remained afloat for over twelve hours. *Had the Mercer stood by and used her syphon, it cannot be taken for granted that the Margaret G. would have gone down, and so it was incumbent upon the tug, the sinking having been proved, to prove that it was not caused by her negligence.*

"It is true that there is no evidence that the Margaret G. was seaworthy when taken in tow or to show what caused the leaking or just when it began. *If it be assumed for the argument, however, that she was unseaworthy when the voyage began, the tug is, nevertheless, liable for any loss attributable solely to its failure to exercise due care to save the boat and cargo from that damage which it could have prevented by taking reasonable and prudent action to protect the boat and cargo from sinking from whatever cause.* McCormick v. Jarrett (D.C.) 37 F. 380. Nor was it shown that the captain of the Margaret G. could have obtained assistance after being moored and abandoned or failed to do all within his power to prevent sinking. On the evidence, the Mercer is responsible for all the damage caused solely by the sinking of the coal boat. (See the M. J. Cummings (D.C.) 18 F. 178; The Jonty Jenks (D.C. 54 F. 1021)"

(Italics ours)

In *THORNE, NEALE & CO. INC. v. READING CO.* (2 CCA) 87 F. (2d) 694, the court said:

" * * * Perhaps it was wrong to leave the barge at the pier at all; She was known to be aleak and it was a bad place if she sank. But since we are holding that the respondent had been assured that the leak could be controlled, we will not charge it for leaving her where she would have been safe, if she had been properly pumped. But when Coll and Grimes went to look at her, just before Burton returned, it could only have been because they

were uneasy about her safety. Grimes went aboard and if he did not see that she had four or more feet of water in her, he should have done so, because that was the case. True, they said that they thought she was then apparently not in danger, but — quite apart from the contradiction of this by three witnesses — if one pump had failed to hold down the water, they should not have assumed that two would necessarily be enough. She did not sink until four hours later, and during all that time they entirely neglected her. If she was too fast aground to move, as they said, they could have pumped her out with a tug's siphon, and then pushed her ashore on an even bottom. To leave her partially aground, liable to strains and to slide off as she did, was to court catastrophe. Unless the respondent was exempt of all duty of care, it too was chargeable with the result." (page 696)

In *F. E. GRAUWILLER TRANSP. CO. INC. v. EXNER SAND & GRAVEL CORPORATION ET AL.* (2 CCA) 162 F. (2d) 90, the Court said.

". * * * True, there is no set measure of this (tug's) liability, or of the occasions which will bring it in existence; as we said in Thorne, Neale & Co. v. Reading Co., supra, 'the question is of the reasonable implications from that undertaking' i.e. the towing contract. * * * " (p. 91)

* * * *

"* * * Whether she was unseaworthy because she leaked more than such a scow should, was a factor in determining what attention she required; but otherwise it was not important. It could become so only in the event that the dredging company had been misled by reliance upon her supposed seaworthy condition, and had exercised a care commensurate with that reliance. The evidence to the contrary was overwhelming. Christiansen found the scow aleak and reported it to Skogen who in turn reported it to the 'dredge operator' Ericksen, who sent out an employee to attend to it." (p. 91)

* * * *

"* * * *Being aware that the scow was unprotected its duty was by so much increased;* as we have said, it might refuse her altogether; but it might not load and then neglect her. Its position was analogous to that of a person who, being aware of the results of another's negligent failure to look out for himself, proceeds in disregard of it." (p. 92)

(parentheses and italics ours).

In *CURTIS BAY TOWING CO. OF VIRGINIA, INC. v. SOUTHERN LIGHTERAGE CORP.* (4 CCA) 200 F. (2d) 33, the Court said:

"The District Court held that the Clark failed in its duty to devote reasonable care to the pro-

tection of the Covered Wagon to prevent her foundering and that this want of care was the proximate cause of her loss. We are asked to review the correctness of this decision. (p. 34)

* * * *

"(3) When the precarious condition of the Covered Wagon was first noticed, she had suffered a diminution of some 85% of her freeboard and the danger of losing her was imminent. Upon boarding her, the tug's crew members could hear water streaming into her bilges, and her cargo of gravel was even then trickling overboard. Unless her trim could be promptly restored or greatly improved, good seamanship demanded that she be beached. * * * " (p. 35)

* * * *

"Nearby shoals and shores readily lent themselves to the success of such a venture. Notwithstanding, the tugmaster installed only one pump on the sinking scow and without standing by alongside for a sufficient time to ascertain its efficacy, resumed the towing in the face of rain, a flood tide and an adverse wind. Such an attempt could only serve to drive the scow deeper into the water, widen her seams, increase her floodage, and shorten her rapidly dwindling life. This is especially true in view of the fact that the scow's losing freeboard was on her leading edge." (p. 35)

Once it has been shown that the tug is placed on notice of a condition affecting the ability of its tow "to live," the burden is upon the tug to show that no reasonable effort to keep the barge afloat was omitted.

CURTIS BAY TOWING CO. OF VIRGINIA, INC. v. SOUTHERN LIGHTERAGE CORP. (4 CCA) 200 F. (2d) 33;
THE MACK ET AL. (E.D.N.Y.) 18 Fed. Supp. 69, 70;
DWYER LIGHTERAGE CO. v. CHRISTIE SCOW CORP. (E.D.N.Y.) 96 Fed. Supp. 903;
FOSS LAUNCH & TUG CO. v. THE KUKKUI, (N.D. Cal.) 130 Fed. Supp. 180, 184.

V.

Whatever may have previously been the law, it now appears to have been settled by the recent decisions of the U. S. Supreme Court in the so-called "Bisso" tow boat cases (BISSO, *RECEIVER v. INLAND WATERWAYS CORPORATION*, 349 U.S. 85, 93, 94) and *MISSISSIPPI VALLEY BARGE LINE COMPANY v. T. J. JAMES & CO. INC.* 5th Circuit, 244 F. 2nd 263, that a tow boat company may not validly contract against liability for its own negligence.

The fact that the bill of lading which does not incorporate, either expressly or by reference, the exculpatory provisions set forth in the tariff, constitutes the sole contract as between the parties, does not therefore appear to require further consideration.

The faults of R. T. C. appear to be clear. R. T. C. by the testimony of Hinkle, Stovall and Allemand, has furnished its own "yardstick" of negligence, viz., Hinkle lightly passed off Frieler's advices as to the leak in the No. 2 tank; Allemand, Captain of the DOTTIE D, with full knowledge of the dangerous trim of the PETER B at Port Arthur, Texas, nevertheless pushed the barge across the intervening 60 to 65 miles of open water, stern-first, at the grossly excessive rate of speed of more than 7 miles an hour; and Stovall, apparently in reliance of advices by Allemand, gave little but "lip-service" to Mrs. White's pleas for advices and assistance.

Allemand claims to have unscrewed the rake manhole cover bolts by hand and viewed the rakes, finding them dry; he made no attempt whatsoever to check the cargo tanks, particularly cargo Tank No. 2, which obviously must have been full of water if the forward rake was dry; he "figured it was none of his business" to check the cargo tanks. That it was his business (and that of R. T. C.) to do everything within his power to find the cause of the dangerous trim and to correct it, seems clear. *(HENRY DU BOIS SONS CO. v. PENNA. R. R. CO.* (2 CCA) 47 F. (2d) 172, 174)

That he did not in fact check the rake, either at Port Arthur or an hour and a half before the barge arrived at the Texas City terminal, seems to be confirmed not only by the fact that Frieler previously required a wrench to do the job, but also by the reports of the surveyors that when the barge was raised some 6 days after the sinking, the manhole covers could be released only after the bolt threads were stripped.

Allemand was required to file a report of all stoppages and delays during the time the barge was in his custody. That he did. Such report shows no stoppage of the tow while en route from Port Arthur to Texas City and no delay. Obviously, if he did inspect, it was not while the barge was in process of being pushed, stern-first at 7 miles an hour, across the open water of the Bay; and it seems equally apparent that he could not have done it in any case with the use of his hands alone.

It seems far more probable that Allemand was content to rely upon the fact that the barge was substantially in the same condition when he deposited her in the slip at Texas City as when he picked her up at Port Arthur. This is what he told Capt. Stovall in fact.

Knowledge by the tug captain, and hence by R. T. C. as to the conditions existing in the berth at the Texas City terminal are to be presumed. (*THE MARGARET*, 94 U.S. 494)

R. T. C. had towed the PETER B some twelve or thirteen round trips prior to the one in question and, as it was familiar with the normal freeboard of the barge, it knew that something must have been wrong when moored at Texas City. It, nevertheless, deposited her at midnight in a deep water berth, i.e., 30 feet of water, with her forward end exposed to the wind and wash of passing vessels in the channel, without notice. It could have, with little effort, placed the barge in a shallow area or, alternatively, could and should have siphoned the rake and the No. 2 tank free of water, which would have corrected the condition and prevented the sinking which subsequently occurred.

Capt. Stovall knew, or was bound to the knowledge given to Hinkle by Frieler, namely, that the barge had a leak in her No. 2 tank. Stovall also knew that Frieler was not at the plant and that Mrs. White was an inexperienced clerical employee who relied implicitly upon Stovall's statement that the barge was in safe condition, notwithstanding the fact that never before had the barge been in such condition, and notwithstanding the fact that her starboard corner was at the water line and waves were washing 2 or 3 feet up on the deck at that corner.

Mrs. White made it very plain in her testimony that, had Stovall indicated to her that the barge was in a dangerous condition, she would have and could have then communicated with Frieler and would have asked Stovall to assist.

Stovall denies that Mrs. White told him the starboard forward corner was at the water's edge and that waves were washing over it. He admits, however, that if she had so advised him, he would have done something about it.

For reasons best known to himself, Capt. Wynne, notwithstanding his claim to experience with floating equipment, adhered to the position that he wanted to be present when the barge was discharged and that the barge was all right, or Stovall would not have said so.

The reason for such light treatment is unknown and it can only be speculated upon, from the carelessness evidenced, that R. T. C. was satisfied with the protection afforded by the exculpatory clauses contained in its tariff.

The failure of R. T. C. to use even a modicum of care and caution in view of the knowledge imputed to it as to the condition of the PETER B was the proximate and actual cause of the sinking and loss claimed in the libel. *(CURTIS BAY TOWING CO. OF VA. v. SOUTHERN LIGHTERAGE CORP.* (4 CCA) 200 F. (2d) 33.

Proctors argue at great length that R. T. C. is certificated by the Interstate Commerce Commission and that the tugs were moving the PETER B subject to carriage rates in R. T. C. Freight Tariff. Ignoring well-established jurisprudence, proctors conclude, and would have this Court announce as a rule of law, that since R. T. C. is certificated as a common carrier and is regulated as a common carrier by the Interstate Commerce Commission, the rules of common carriage and not towage are applicable herein. The fact that R. T. C. was, at the time of the casualty which is the subject of the instant proceedings, and now is, certificated as a common carrier by water by the ICC, pursuant to the provisions of the Transportation Act of 1940, 49 U.S.C., Sec. 901, et seq., certainly cannot be denied. However, it is quite clear that the principles of ordinary towage and not common carriage govern the responsibility and liability of R. T. C. to barge and cargo interests.

The question of what rules of liability govern the responsibility of towboats operating as common carriers was first considered in the now famous Cornel litigation. In *CORNELL STEAMBOAT CO. CONTRACT CARRIER APPLICATION*, 250 I.C.C. 301 (1942), a case tried before the Interstate Commerce Commission, which was ultimately appealed to the United States Supreme Court, the issue was whether persons moving loaded and/or light barges

and scows owned or furnished by shippers and, accordingly, engaged in what was traditionally towing, as Cornell was, could properly be regulated as common carriers under the Transportation Act of 1940. Cornell maintained that in the absence of any specific provision of the Act bringing towers within the category of water carriers, it could not be assumed that Congress intended to change the established law that such towers were not carriers, or that Congress intended to include towers when it authorized the ICC to regulate water carriers. In support of its contention, Cornell cited a number of cases distinguishing between towage and carriage, but the ICC, in its decision holding that Cornell was subject to regulation as a common carrier under the Act, pointed out that the decisions cited by Cornell distinguishing between towage and carriage involved claims for damages, and stated significantly:

> "It will be seen that all the foregoing decisions involved claims for damages to the tow or its cargo, and all held in effect that the owners of towboats, when engaged only in towing vessels belonging to others and not under contracts of affreightment, were not carriers. Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320 (d) that:
>
> > 'Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws

respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.'

"In view of section 320 (d), we consider that a finding that towers are carriers within the contemplation of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

* * * *

"We conclude that Part III discloses the intention of Congress to regulate towers engaged in interstate towing except to the extent that specific exemptions are provided."

In other words, although holding that Cornell was subject to regulation under the Act, the Commission pointed out that it was not the intent of Congress to disturb the rules governing the liability of vessels or their owners for loss or damage.

The decision of the Commission was a disappointment to Cornell and a suit was promptly filed complaining of its order. However, in *CORNELL STEAMBOAT CO. vs. UNITED STATES*, 53 F. Supp. 349 (D.C.N.Y. 1943), the District Court for the Southern District of New York, with three Judges participating, dismissed Cornell's complaint. The Court, like the Commission, emphasized that a common carrier so classified for the purpose of regulation was not

necessarily a common carrier for purposes of legal liability to customers:

> "We fail to understand plaintiff's contention that, because it was not a common carrier for purposes of liability under the Harter Act, 46 U.S.C.A. Sec. 190 et seq; or otherwise in Admiralty or at common law, this Act should be construed as not intended to include it as a common carrier; for in section 320 (d) Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff 'common carriers' in this Act, they do not become such for all purposes; this is made clear by section 302 which, in so labeling them, expressly states that it does so 'for the purpose of this Act'. And see State of Washington ex rel. Stimson Lumber Co. vs. Kuykendall, 275 U.S. 207, 211, 212; United States vs. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 304; Liverpool & G. W. Steam Company vs. Phenix Insurance Co., 129 U.S. 397, 440."

The decision of the District Court was appealed by Cornell to the United States Supreme Court where, in the landmark case of *CORNELL STEAMBOAT CO. VS. UNITED STATES*, 321 U.S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (1944), the Court affirmed the decision of the lower Court, explained that it was not the intent of Congress when it passed the Transportation Act of 1940 to disturb or determine the legal status of vessels for all purposes or to change the responsibility of vessels, but merely to provide for regulation of the rates of competing water carriers,

as part of a broad plan to regulate and standardize interstate transportation:

> " * * * But the authorities relied upon by Cornell are of little or no assistance here. The case at bar does not require that we determine at large the legal obligations of a tower or define the usual characteristics of a carrier. We are called upon only to interpret a single Act of Congress. With unquestioned power to regulate Cornell's business, Congress in this Act has given its own definition to Cornell's activities in words literally inclusive of those activities, and which operate to subject to the Act interstate activities in the business of towing, which at common law was a common calling. Sproul v. Hemmingway, 14 Pick. (Mass) 1, 6, 25 Am Dec 350. The Act in which Congress has included this definition is designed, not to determine the legal status of vessels for all purposes, but to provide for regulation of the rates and services of competing interstate water carriers as part of a broad plan or regulation for all types of competing interstate transportation facilities * * * "

Actually, in the Cornell litigation, the Interstate Commerce Commission and the Courts merely took cognizance of the unambiguous language of Section 320 (d) of the Act itself, which specifically provides that nothing in the Act shall be construed to affect "liabilities of vessels and their owners for loss or damage."

As important, if not more important than the Cornell case, is the case of *PETITION OF RELIANCE MARINE TRANSP. & CONST. CORP.*, 89 F. Supp. 272 (D.C. Conn. 1950). The case is particularly pertinent because in some significant respects the facts were similar to the facts of the instant case. The owner of the Tug SKIPPER had filed a tariff with the Interstate Commerce Commission, and was apparently, like R. T. C., certificated as a common carrier by water. Nevertheless, the Court, citing the decision of the Supreme Court in the Cornell case, unequivocally held that the existence of the published tariff did not transform for liability purposes what was really private carriage into public carriage:

> "* * * This tariff was designated I.C.C. No. 7 and McWilliams was licensed and required to file such a tariff by the Interstate Commerce Commission. I hold, however, that the existence of this published tariff did not serve to transform a private carriage into a public carriage: it was the Congressional intent by the Transportation Act of 1940, 54 Stat. 898, 49 U.S.C. Sec. 1 et seq; 901 et seq; not to change the liabilities of vessels, but merely to subject them to regulation. Cornell Steamboat Co. vs. U.S., 321 U.S. 634, 64 S. Ct. 768, 88 L. Ed. 978."

If the owners of the Tug SKIPPER by publishing a tariff could not "transform" what was really private carriage into common carriage, certainly, by publishing a tariff, R. T. C. could not "transform" what was really towage into common carriage.

It is manifestly clear that the movement of the PETER B was one of towage in the traditional sense. Cargo interests loaded and furnished the barge and R. T. C., by arrangement, merely the vessel to move the barge. Such a movement has been for years by custom and by definition towage. Under the holdings of the Cornell case and Petition of Reliance Marine Transp. & Const. Corp., supra, even the timely issuance of a bill of lading could not "transform" what was towage into common carriage. Of course, the Ideal Cement Company vs. The Tickfaw, 143 F. Supp. 904 (E.D. La. 1956) is also particularly pertinent in this regard because in that case the Court held that the movement was towage although a bill of lading had been accepted.

Gross inequities would result if this movement were held to be one of common carriage for liability purposes. This is true because, to hold that the rules of liability of common carriage apply, would have the effect of rendering the relatively recent decision of the Supreme Court in the case of Bisso vs. Inland Waterways, supra, declaring release towage agreements void, as contrary to public policy, virtually meaningless in most instances where the owner of the negligent towing vessel was certificated by the Interstate Commerce Commission as a common carrier. The Bisso decision would be rendered virtually meaningless, because the Harter Act automatically applies in the case of domestic common carriage and the operators of vessels acting as common carriers could not be made answerable for damages resulting from the faulty management or navigation of their vessels as responsibility for such errors is specifically excluded by Section 3 of the Act, if due diligence has been exercised to make the carrying vessel sea-

worthy. Obviously, most casualties in which towboats are involved are occasioned by errors in management or navigation, and, if it were held that the rules of common carriage and not towage apply, where towboats, operated by certificated companies, are moving barges owned or furnished by the cargo interests, the incredible result would be that vessels operating as common carriers would be in an infinitely better position from a liability standpoint than vessels operating under the rules of towage, although traditionally common carriers have with good reason been held to a higher degree of care than ordinary towers. Of course, the respondent realizes that in view of the Bisso decision responsibility for negligence can now be avoided only through the Harter Act and, accordingly, the towboat operator "is adjusting its cap to fit the charge in circumstances" and is maintaining that the rules of common carriage apply. It is indeed ironic to find River operators who have long attempted to avoid liability as common carriers by insisting that they were towers, now attempting to hold themselves out as common carriers for liability purposes.

If this Court should erroneously hold that the rules of common carriage govern liabilities herein, an additional incongruous and inequitable situation would be needlessly created. By the terms of the Transportation Act of 1940, vessels under 100 tons cannot act as common carriers by water without the special permission of the ICC, 49 U.S.C. 903 (g) (2). Accordingly, if it were held that the towboats of more than 100 tons operated by certificated companies act as common carriers, even insofar as liability is concerned, the large towing concerns who can best afford to compensate individuals for damages occasioned by the negligent navigation of their vessels, would in some in-

stances receive a protection not afforded the operators of smaller vessels who could operate, only as towers, and who, although no longer able to protect themselves with release towage agreements, could not as towers avail themselves of the protection of the Harter Act. Is one vessel, towing a barge furnished by cargo owners, a towing vessel for liability purposes and another a carrier merely because it is larger and the company operating it has been certificated by the Interstate Commerce Commission? It is submitted that the Cornell litigation correctly decided this question negatively.

Throughout this litigation Respondent has maintained that the release agreement and all of the other exculpatory clauses and terms of its Tariff must be presumed to be reasonable and enforceable unless and until the Interstate Commerce Commission declares any one or more of them invalid and unenforceable. Counsel for Petitioner submits that neither any such tariff nor the approval thereof by the Interstate Commerce Commission can be used or enforced in such a way as to vitiate the doctrine laid down by this Court in Bisso v. Inland Waterways Corporation, supra.

Respondent has cited United States v. Western Pacific Railroad Company, 352 U.S. 59, 77 S. Ct. 161 (1956), as authority for its contention that the Interstate Commerce Commission and not the Courts must pass on the reasonableness of such clauses of its Tariff. We must point out that the contention of the Respondent that the Courts are powerless to declare illegal exculpatory clauses in Interstate Commerce Commission approved tariffs, and the litigant must first resort to the Interstate Commerce Commission,

is answered by the words of this Court itself in the decision relied upon by Respondent, for, in United States v. Western Pacific Railroad Company, supra, this Court was very careful to limit the effect of its decision by saying, at page 69:

> "By no means do we imply that matters of tariff construction are never cognizable."

Further, in connection with the construction of another tariff this Court clearly held in the case of St. Louis, Iron Mountain & Southern Railway Co. v. Hasty & Sons, 255 U.S. 252, 41 S. Ct. 269 (1921), at page 256:

> "This matter is so free from doubt that there is no occasion to apply to the commission for a construction, as insisted by appellant * * * "

In Great Northern Railway Company v. Merchants Elevator Company, 259 U.S. 285, 42 S. Ct. 477 (1922), this Court likewise stated in a case concerning the construction of a Tariff that (page 294):

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed as to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore unnecessary."

We hardly need call the Court's attention to the fact that in United States v. Western Pacific Railroad Company, supra, the question involved concerned tariff classifications and rates, while in this case there is no question of tariff classifications or rates but solely a legal question as to the validity and construction of exculpatory clauses which the Courts are preeminently the fit tribunals to pass upon rather than the Interstate Commerce Commission. This is especially true since the Interstate Commerce Act (Transportation Act of 1940), supra, under the terms of which Respondent is certificated, specifically provides that it was not the intent of Congress to change the legal liabilities of vessels for damages.

CONCLUSION

The Court of Appeal for the Fifth Circuit, in the case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263 held the same provision as involved in the instant case void and of no effect. Writs were applied for and denied in the United States Supreme Court on November 12, 1957, 78 S. Ct. 121.

As the Court is well aware, the question of the validity of the exculpatory clause releasing a tower from its own negligence was litigated in the various courts all over the United States and in some circuits was held valid and in others as void and against public policy. This Court in the Bisso case, supra, granted writs in order that this question be finally set at rest. This Court held that such an exculpatory clause was void and of no effect. Towers as well as

shippers were apparently relieved because prior to this they were constantly in a quandry as to their rights.

However, now the Court of Appeal has disregarded the Bisso case and has reversed the decision of the trial court, holding the clause void and of no effect, and has remanded the case in order that petitioner have opportunity to seek administrative relief before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

The question of the validity of this clause has already been passed on by this Court and the Court of Appeal is apparently trying to divest the Courts from having jurisdiction to pass on this all important question. The question of the validity of this clause has been squarely before this Court and passed upon. To allow the Interstate Commerce Commission to have jurisdiction to pass on this would merely throw this matter back into the turmoil that existed prior to the Bisso case.

To leave this matter as it now stands can only lead to confusion which we feel sure this Court intended to put at an end with the granting of writs and the subsequent decision in the Bisso Case. If this matter is not set at rest, undoubtedly shipping interests will again be faced with conflicting decisions from the various circuits as there was prior to the Bisso case.

It is respectfully submitted that the decision of the Court of Appeals should be reversed and the decree of the District Court should be reinstated.

SOUTHWESTERN SUGAR & MOLASSES CO., INC.,
Petitioner

BY:_____
CLEM H. SEHRT
PERE MARQUETTE BLDG.
NEW ORLEANS, LA.
Counsel for Petitioner

OF COUNSEL
Amos L. Ponder, Jr.
P. M. Flanagan
New Orleans, La.

December ____, 1958

CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

_____

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 7 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,

Petitioner,

versus

RIVER TERMINALS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RIVER TERMINALS CORPORATION, RESPONDENT.

CARL G. STEARNS,
Bank of the Southwest Building,
Houston, Texas,

SELIM B. LEMLE,
National Bank of Commerce Building,
New Orleans, Louisiana,
Proctors for Respondent.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
Bank of the Southwest Building,
Houston, Texas,

LEMLE & KELLEHER,
National Bank of Commerce Building,
New Orleans, Louisiana,
Of Counsel.

HAUSER PRINTING CO., INC., NEW ORLEANS

INDEX

PAGE

THE OPINIONS BELOW 1

THE STATUTES INVOLVED 2

THE QUESTIONS PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE DECREE OF THE COURT OF APPEALS IS CORRECT 9

This was Regulated Transportation 9

To Engage in Regulated Transportation A Certificated Carrier Must Establish, Observe and Enforce Reasonable Rates, Regulations and Practices and Must Embody Them in a Tariff Filed with the Interstate Commerce Commission from Which the Carrier Cannot Depart 11

R.T.C. Filed Its Tariff in Accordance with The Requirements of Part III of the Interstate Commerce Act, and It Became Effective. Thereafter It Bound Both Shippers and R.T.C. "With the Force of Law" 13

The Court of Appeals Recognized the Principle That Until Changed Tariffs Bind Both Carriers and Shippers with the Force of Law, Held Correctly That the Interstate Commerce Commission Has the Primary Jurisdiction to Consider Tariff Changes and Remanded the Case To the District Court To Give Southwestern an Opportunity to Attack the Reasonableness of the Tariff Before the Interstate Commerce Commission 15

INDEX—(Continued)

PAGE

It Is Not Against Public Policy for a Carrier By Water To Exculpate Itself from Liability for Loss and Damage Which Results from the Negligent Management of a Vessel 20

The Bisso Case Does Not in Any Way Affect the Principles Pronounced by the Court of Appeals in Its Opinion and for Which We Are Here Contending 22

The Cornell Steamboat Case Does Not in Any Way Affect the Principles Pronounced by the Court of Appeals in Its Opinion and for Which We Are Here Contending 24

Exculpation from Liability Is One of the Matters with Which the Interstate Commerce Commission May Deal in Approving Rates, Charges and Services of Carriers 25

II. IN THE EVENT THE DECREE OF THE COURT OF APPEALS BE NOT AFFIRMED, THEN THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR FURTHER PROCEEDINGS 26

III. IF YOUR HONORS CONSIDER ANY ISSUE WHICH HAS NOT BEEN DETERMINED BY THE COURT OF APPEALS, THEN IT IS OUR POSITION THAT THE DECREE OF THE DISTRICT COURT IS CLEARLY ERRONEOUS 27

First Assignment of Error:

The [District] Court Erred in Holding that the Libellant, Southwestern Sugar and Molasses Company (Inc.), Had Any Interest in the Barge PETER B Which Entitled It to Maintain a Libel for Damage to the Barge 28

INDEX—(Continued)

PAGE

Second Assignment of Error:

The Court Erred in Holding that in the Movement of the Barge PETER B with a Cargo of Molasses Therein from Reserve, Louisiana, to Texas City, Texas, the Respondent, River Terminals Corporation, was Guilty of Negligent Towage 32

There Was No Negligent Towage 34

The Cause of the Sinking of the Barge PETER B Was Inherent Unseaworthiness Which Existed When the Barge Was Converted from an Open Hopper Barge to a Tank Barge, Grossly Aggravated by Deterioration Due to Old Age and Improper Maintenance Which Manifested Itself by a Leaky Condition During Loading at Reserve. All of This Was Unknown to R.T.C. 38

The Loading at Reserve 40

The PETER B Sprang a Leak Due to Deterioration and Improper Maintenance 41

Cause of the Sinking of the Barge PETER B 45
Southwestern Had the Last Clear Chance to

Prevent the Barge PETER B from Sinking 51

CONCLUSION 71

APPENDIX 73

CITATIONS

Cases PAGE

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 22

Brown v. Fletcher, 237 U.S. 583, 35 S. Ct. 750 27

The Cornelius Vanderbilt, 120 F. 2d 766, 1941 A.M.C. 1245 52

Cornell Steamboat Company v. United States, 321 U.S. 634, 64 S. Ct. 768 ..... 10, 22, 24

Coyle Lines v. U. S., 195 F. 2d 737, 1952 A.M.C. 715 51

Crancer v. Lowden, 315 U.S. 631, 62 S. Ct. 763 15

Crawford v. Indian Towing Company, 240 F. 2d 308, 1957 A.M.C. 250 ..... 52, 71

El Dorado Oil Works v. United States, 328 U.S. 12, 66 S. Ct. 843 ..... 18, 19

Far East Conference v. United States, 342 U.S. 570, 72 S. Ct. 492 17

General American Tank Car Corp. v. El Dorado T. Co., 308 U.S. 422, 60 S. Ct. 325 ..... 18, 19

In Re O'Donnell, 26 F. 2d 334 10

The Lehigh, 12 F. Supp. 75 10

Lone Star Bag & Bagging Co. v. Florida Sword, 1956 A.M.C. 1560 51

Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 59 S. Ct. 612 15

Lutcher & Moore Lumber Co. v. Knight, 217 U.S. 257, 30 S. Ct. 505 27

Lykes Bros. S. S. Co. v. Waterman, 138 F. Supp. 725, 1956 A.M.C. 1194 51

The New York, 175 U.S. 187, 20 S. Ct. 67 51

Sacramento Navigation Company v. Salz, 273 U.S. 326, 47 S. Ct. 368 ..... 9, 10

The Sanday, 122 F. 2d 325, 1941 A.M.C. 1249 52

CITATIONS—(Continued)

Cases—(Continued) PAGE

Stall & McDermott v. The Southern Cross, 95 F. Supp. 612, 1951 A.M.C. 549 ..... 32, 45, 51

Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350 17

United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882 27

United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S. Ct. 161 16

The Vale Royal, 51 F. Supp. 412 10

Statutes

Sections 1 and 2 of the Carriage of Goods by Sea Act, being 46 U.S.C. 1304, Act of April 16, 1936, c. 229, § 4, 49 Stat. 1210 ..... 20, 21, 22, 90

The Elkins Act, 49 U.S.C. 41, et seq. 12

Revised Statute 4282, being 46 U.S.C. 182, Act of March 3, 1851, c. 43, § 1, 9 Stat. 635 (The Fire Statute) 20, 88

Sections 1, 2 and 3 of the Harter Act, being respectively 46 U.S.C. 190, 46 U.S.C. 191, and 46 U.S.C. 192, Act of February 13, 1893, c. 105, §§ 1, 2 and 3, 27 Stat. 445 ..... 21, 88, 89

Part III of the Interstate Commerce Act, 54 Stat. 929, et seq., as amended, Title 49, Chapter 12, United States Code, and particularly: 2, 16, 26

Sections 303(b), 303(d) and 303(e) of Part III of the Interstate Commerce Act, being 49 U.S.C. 903, Act of February 4, 1887, c. 104, Part III, § 303, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 931, and amended 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1097, June 12, 1948, c. 457, 62 Stat. 386 ..... 10, 82

CITATIONS—(Continued)

Statutes—(Continued) PAGE

Sections 305(a) and 305(c) of Part III of the Interstate Commerce Act, being 49 U.S.C. 905(b), Act of February 4, 1887, c. 104, Part III, § 305, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 934 ..... 11, 84

Sections 306(a), 306(c) and 306(d) of Part III of the Interstate Commerce Act, being 49 U.S.C. 906, Act of February 4, 1887, c. 104, Part III, § 306, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 935 ..... 2, 11, 12, 85

Section 314 of Part III of the Interstate Commerce Act, being 49 U.S.C. 914, Act of February 4, 1887, c. 104, Part III, Section 314, as added September 18, 1940, c. 722, Title II, Section 201, 54 Stat. 945 ..... 18, 87

Section 320(d) of Part III of the Interstate Commerce Act, being 49 U.S.C. 920(d), Act of February 4, 1887, c. 104, Part III, § 320, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 950 ..... 25, 88

Textbooks

Benedict on Admiralty, Sixth Edition, Section 245, page 82 31

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,

Petitioner,

versus

RIVER TERMINALS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RIVER TERMINALS CORPORATION, RESPONDENT.

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 253 F. 2d 922 and will be found at R. 269.[1] The findings of fact and conclusions of law of the United States District Court for the Eastern District of Louisiana are reported in 153 F. Supp. 923 and will be found at R. 261.

---

[1] For the Court's convenience it is reproduced in the Appendix, *infra* page 73 *ff.*

THE STATUTES INVOLVED

Part III of the Interstate Commerce Act, 54 Stat. 929, *et seq.*, as amended, Title 49, Chapter 12, United States Code, and particularly Sections 306(a), 306(c) and 306(d) of Part III of the Interstate Commerce Act, being 54 Stat. 935, 49 U.S.C. 906 (a), (b) and (d), which provide in general that every common carrier by water shall file its tariff with the Interstate Commerce Commission, shall state therein its rates and "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper or consignee" and shall neither depart therefrom nor perform any transportation not specified in the tariffs filed.[2]

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court or the Interstate Commerce Commission has the primary jurisdiction to determine the reasonableness and validity of rates, and of all rules and regulations which in anywise change, affect or determine any part or the aggregate of the rates or charges or the value of the service rendered to a shipper or consignee, prescribed in a tariff duly filed by a carrier with the Interstate Commerce Commission and by it published.

2. In the event that this Court should determine that such primary jurisdiction does not lie exclusively in the Interstate Commerce Commission but may be exercised by the Courts, then the question will be presented whether in a case such as the one at bar, where the

---

[2] Reproduced in full in the Appendix, *infra*, p. 85 *ff*. Particular reference is also made to Sections 305(a) and 305(c), 54 Stat 934, being 49 U.S.C. 905, (a) and (c) reproduced in full in the Appendix, *infra*, p. 84 *ff*. Reference is also made to the Elkins Act, as amended, being 49 U.S.C., Section 41, *et seq.*, prescribing penalties for violation of the Interstate Commerce Act.

United States Court of Appeals has decided only the jurisdictional question and reserved its decision on the merits, Your Honors will consider and decide this case on its merits or remand it to the Court of Appeals for such decision.

3. If this Court considers any issue in this case other than the jurisdictional issue decided by the United States Court of Appeals for the Fifth Circuit, the question then will arise whether the District Court has correctly decided this case on its merits, it being our position, duly presented to the Court of Appeals, that the District Court's decision is clearly erroneous.

STATEMENT OF THE CASE

Respondent, River Terminals Corporation,[3] was a common carrier by water of freight for hire between various points,[4] so certificated by the Interstate Commerce Commission under Part III of the Interstate Commerce Act.[5] This transportation was performed in barges either owned by respondent or furnished by shippers, with the use of towboats owned or procured by the carrier.

Petitioner, Southwestern Sugar and Molasses Co., Inc.,[6] was a shipper of freight which, pursuant to a regular practice for R.T.C. to transport molasses for Southwestern in Southwestern's barges, in the first part of September, 1944, gave respondent an order to transport a cargo of molasses from Reserve, Louisiana, to Texas City, Texas in the Barge PETER B, furnished by South-

[3] Hereinafter referred to as "R.T.C."

[4] Including Reserve, Louisiana, located on the Mississippi River, and Texas City, Texas, located on the Intracoastal Waterway system, the points between which moved the shipment which gave rise to this litigation.

[5] R.T.C's. Request for Admissions No. 9, R. 40, and Southwestern's Admission No. 9, R. 60, both offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[6] Hereinafter referred to as "Southwestern".

western. This R.T.C. proceeded to do under its then current Tariff I.C.C. No. A-9. The barge was loaded by Southwestern at Reserve, Louisiana, no representative of R.T.C. being then present, and, unknown to R.T.C. before its tug took the barge away from Reserve, sprang a leak in a cargo tank during loading.

In due course of business, without any knowledge of the condition of the barge, on September 17, 1944, R.T.C. issued a bill of lading [7] in its standard form for the cargo of molasses and delivered it to Southwestern, which retained the possession thereof without comment.

R.T.C. moved the barge with its molasses cargo on the Mississippi River to Harvey, Louisiana, where the barge entered the Intracoastal Canal and was incorporated into a westbound flotilla with three other barges carrying pipe and steel.[8] The four barges were moved successively by two of R.T.C.'s tugs, three barges were delivered en route, and the Barge PETER B, in the early hours of the morning of September 23, 1944, completed its voyage to Texas City and was tied up at a pier designated by Southwestern for its delivery. The tug then went on to Houston. The presence of the barge was known to the pier watchman on delivery, and was ascertained by those in charge of Southwestern's Texas City terminal early—and certainly not later than 9:00 a.m.—on the morning of September 23.[9] With full knowledge that the barge had sprung a leak while being loaded at Reserve, they did not undertake to discharge the barge,

---

[7] Attached to the supplemental libel as Exhibit A, R. 26; introduced in evidence, R. 160.

[8] Respondent's Exhibit #4, sent to this Court in the original, identified and offered in evidence R. 164. Page 5 of the report attached to that exhibit shows the tow of the Tug SAMBO on September 18, 1944, consisted of the Barge PETER B loaded with molasses, Barges ABL 155 and ABL 164 loaded with pipe, and Barge CT 350 loaded with steel.

[9] R. 174.

notwithstanding the fact that they had facilities available so to do and a tankerman-employee available to perform this service.[10] The barge was permitted to sit unattended all of that day and the following night, tied to the wharf, and in the early morning hours of September 24 the forward end of the barge sank, but the after end always remained afloat. The barge and part of the cargo were salvaged, and Southwestern sued R.T.C. for the cost of raising the barge, for alleged damage thereto and for cargo allegedly lost.

This litigation was initiated by a libel filed on September 22, 1945, in the United States District Court for the Eastern District of Louisiana, by Southwestern against R.T.C., wherein Southwestern alleged a verbal contract of towage and negligent towage as the bases for recovery. R.T.C. answered, denying liability, generally speaking on four grounds:[11]

1. That it was guilty of no negligence in the movement of the barge and its cargo.

2. That the barge sank from inherent unseaworthiness.

3. That R.T.C. was relieved of any liability by virtue of certain terms and provisions of its Tariff I.C.C. No. A-9,[12] including two provisions in particular:

> (a) when shipments are transported in barges furnished by the shipper then barges and cargoes will be handled at owner's risk only,

[10] R. 171 and R. 134.

[11] Original answer, R. 7, *ff.*

[12] Items 580 and 640 of R.T.C.'s Tariff I.C.C. No. A-9 are reproduced in full in the Appendix, *infra*, p. 92 *ff.* They have been admitted by Southwestern; see R.T.C.'s Request for Admissions, No. 9, R. 41-42, and Southwestern's Admission No. 9, R. 60, offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

whether loss or damage is caused by negligence or otherwise (Item 580); and

(b) where a shipper furnishes a barge for the carriage of cargo, the presentation of the cargo in the barge for movement on the rates named in the tariff shall constitute a guarantee to the carrier that such barge is seaworthy and that the barge and cargo are in suitable condition for the prospective voyage (Item 640).

4. That R.T.C. delivered the barge at destination in apparent good order and condition, tied it up safely and departed, and that such delivery constituted a fulfillment of R.T.C.'s obligations.

Subsequently, by an amended libel filed on April 5, 1948,[13] Southwestern alleged the issuance of a bill of lading which it attached to the amended libel, marked Exhibit A,[14] and alleging as to the molasses cargo an affreightment instead of a towage, sought cargo damage on the theory that it had delivered at origin to the carrier, R.T.C., sound cargo which R.T.C. had delivered damaged at destination. In answer to this amended libel R.T.C. reiterated its denial of any negligent act committed in the movement of the barge and its cargo, reiterated the allegations of its original answer with regard to its tariff, and plead an additional item, Item 896(g), of its tariff[15] providing that actual placement of a barge is delivery thereof by the carrier to the point of unloading designated by the shipper. It added as a further ground for defense that any damage to the barge and its cargo was caused proximately by Southwestern's

---

[13] R. 26.

[14] R. 26. Introduced in evidence R. 160.

[15] Item 896(g) of R.T.C.'s Tariff I.C.C. No. A-9, reproduced in full in the Appendix *infra*, p. 93. It has been admitted by Southwestern; see R.T.C.'s Request for Admissions No. 9, R. 41-42, and Southwestern's Admission No. 9, R. 60, offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

failure to care for the barge and its cargo after its delivery at Southwestern's wharf at Texas City.

The District Court held[16] that the movement of both barge and cargo constituted towage; that R.T.C. had been guilty of negligence in the management of the Barge PETER B[17] which constituted negligent towage; and rendered an interlocutory decree of liability in favor of Southwestern (leaving quantum of damages to be determined subsequently). R.T.C. appealed from this interlocutory decree to the United States Court of Appeals for the Fifth Circuit, assigning a number of errors,[18] including the failure of the District Court to give effect to the exculpatory provisions in respondent's tariff and want of interest in the libellant to sue for ~~cargo~~ barge damage, and attacking the District Court's finding of negligent towage on the ground that it was clearly erroneous. The Court of Appeals,[19] without passing on any other issue, but specially reserving them, held that R.T.C. had raised a good defense based on the exculpatory provisions of its tariff filed with the Interstate Commerce Commission because these exculpatory provisions should be considered valid and be given effect unless and until they be determined invalid by the Commission; and remanded this case to the District Court with instructions to give effect to the exculpatory provisions of R.T.C.'s tariff unless and until they are declared invalid in a proceeding to be initiated by Southwestern before the Commission within a reasonable time.

Southwestern petitioned for a writ of certiorari to review this judgment, which Your Honors have granted.

---

[16] See Findings of Fact and Conclusions of Law, R. 261.

[17] As distinguished from negligence in care and custody of cargo.

[18] Reproduced at R. 258.

[19] Opinion reproduced in the Appendix *infra* p. 73 *ff.*

SUMMARY OF ARGUMENT

I. The judgment of the Court of Appeals is correct. This is transportation regulated under Part III of the Interstate Commerce Act. The provisions of the carrier's tariff constitute the law between the parties and should be given full force and effect unless and until changed in accordance with law. The Interstate Commerce Commission is vested with primary jurisdiction to determine the propriety of the tariff, the necessity for any changes and, if necessary, to prescribe them. The action of the Court of Appeals in remanding this case to the District Court to permit petitioner to apply to the Interstate Commerce Commission for relief is proper.

II. In the event that this Court reverses the judgment of the Court of Appeals it should remand this case to that Court for further proceedings.

III. In the event that this Court reverses the judgment of the Court of Appeals and does not remand this case to the Court of Appeals for further proceedings but considers this case on its merits, then we submit that the decree of the District Court is clearly erroneous because (a) the petitioner has no interest which entitles it to sue for barge damage in this case; (b) there was no negligent towage; (c) the Barge PETER B sank from inherent unseaworthiness; and (d) the petitioner had the last clear chance to prevent the sinking of the Barge PETER B; any act performed by the respondent merely resulted in a condition, but could not have been the proximate cause of the sinking.

ARGUMENT

I.

THE DECREE OF THE COURT OF APPEALS IS CORRECT

The opinion of the Court of Appeals[20] set forth so clearly, precisely and succinctly the facts necessary to its determination of the one issue which it considered and the law applicable thereto that any amplification thereof by us seems superfluous. However, we submit the following:

This Was Regulated Transportation

Unquestionably the movement of both the Barge PETER B and its molasses cargo from Reserve to Texas City was transportation regulated under Part III of the Interstate Commerce Act, whether the movement of the barge and cargo were both towage or both affreightment or the movement of the barge was towage and of the cargo, for which the bill of lading had been issued, affreightment. This is the view of the case which has been taken by the Court of Appeals: this was regulated transportation regardless of whether it was towage or affreightment.[21] No one would seriously contend that if the movement were affreightment it was not subject to

---

[20] Reproduced in the Appendix, *infra* p. 73. *ff.*

[21] We consider that it is immaterial whether this movement was affreightment or towage for the purpose of determining the precise question which has been determined by the Court of Appeals, i.e., that R.T.C.'s tariff provisions are valid and should be given effect unless and until declared invalid by the Interstate Commerce Commission in a proper proceeding. However there are other aspects of this case, determined by the District Court but not by the Court of Appeals, in which the distinction might become material. In *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368, Your Honors held that the movement of cargo on board a barge towed by a tug or towboat is affreightment and not towage, notwithstanding the fact that the vessel performs towage service to the barge. Although in that case the cargo-carrying barge and the towing vessel were commonly owned, it does not appear that Your Honors gave any effect in your decision to such

(Continued)

regulation under Part III of the Interstate Commerce Act, and any doubt that towage of a regulated commodity is equally subject to such regulation has been put at rest by Your Honors in *Cornell Steamboat Company v. United States*, 321 U.S. 634, 64 S. Ct. 768. There are only three possible pertinent exemptions found in Part III of the Interstate Commerce Act, and none of them are applicable to this movement. The first exemption is that commonly known as the "Bulk Commodities Exemption" contained in Section 303(b) of Part III of the Interstate Commerce Act.[22] For the purpose of this exemption multiple vessels in one flotilla are considered the same as a single vessel, and since the Barge PETER B was moved in one of R.T.C.'s regular tows in a flotilla including three bargeloads of pipe which were regulated commodities, the entire movement became regulated.

The second exemption is found in Section 303(d) of Part III of the Interstate Commerce Act.[23] This exemption is inapplicable because while the Barge PETER B was a tank barge, it had never been certificated by the Coast Guard, which is a condition precedent to the application of the exemption.

The third exemption is found in Section 303(e) of Part III of the Interstate Commerce Act,[24] which per-

---

[21] (Continued)
joint ownership. On the contrary you placed your decision squarely on the contractual relationship which arose out of the bill of lading for the movement of the cargo (273 U.S., at pages 328, 329; 47 S. Ct. at page 369). This is the interpretation which has been placed on *Sacramento Navigation Co.—Salz* by all the Courts other than the Fifth Circuit that have considered the question of the pertinency of the common ownership of the tug and barge. See *In Re O'Donnell* (2 C.C.A., 1928) 26 F. 2d 334; *The Lehigh* (D.C.W.D.N.Y., 1935) 12 F. Supp. 75; and *The Vale Royal* (D.C.D.Md., 1943) 51 F. Supp. 412.

[22] 54 Stat. 941 and 60 Stat. 1097, being 49 U.S.C. 903(b), reproduced in the Appendix *infra*, p. 82.

[23] 54 Stat. 941 and 60 Stat. 1097, being 49 U.S.C. 903(d), reproduced in the Appendix *infra*, p. 82.

[24] 54 Stat. 941 and 60 Stat. 1097, being 49 U.S.C. 903(e), reproduced in the Appendix *infra*, p. 82.

mits the Commission by order either upon application of shippers or on its own initiative from time to time to exempt the transportation of certain commodities. No exemption has ever been granted with regard to molasses cargoes, and as the petitioner is making no such claim, it is unnecessary to labor this point.

We reiterate that the movement of the Barge PETER B and its cargo was transportation regulated under Part III of the Interstate Commerce Act.

To Engage In Regulated Transportation A Certificated Carrier Must Establish, Observe And Enforce Reasonable Rates, Regulations And Practices And Must Embody Them In A Tariff Filed With The Interstate Commerce Commission From Which The Carrier Cannot Depart.

Section 305 of Part III by Paragraph (a)[25] requires every common carrier by water with respect to transportation regulated by the Act to furnish such transportation upon reasonable request therefor and to establish, observe and enforce just and reasonable rates, fares, charges and classifications and reasonable regulations and practices with regard to all phases of the transportation.

Section 305(c) of Part III[26] forbids discrimination by any carrier subject to the Act.

Section 306(a) of Part III[27] requires a regulated carrier by water to file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations

---

[25] 54 Stat. 934, being 49 U.S.C. 905(a), reproduced in full in the Appendix *infra*, p. 84.

[26] 54 Stat. 934, being 49 U.S.C. 905(c), reproduced in full in the Appendix *infra*, p. 84.

[27] 54 Stat. 935, being 49 U.S.C. 906(a), reproduced in full in the Appendix, *infra*, p. 85.

and practices for the transportation of property in interstate commerce, and that such tariffs shall embody "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee".

Section 306(c) of Part III[28] forbids a regulated carrier by water from charging, demanding, collecting or receiving any greater or less or different compensation than the published rate and from extending to any person any privilege or facilities for transportation affecting the value thereof except such as are specified in its tariff.

Section 306(d) of Part III[29] forbids any change to be made in any rate, fare, charge, classification, rule, regulation or practice specified in any effective tariff by a regulated water carrier except after thirty days' notice of the proposed change filed with the Commission and posted.

The Elkins Act[30] penalizes as a misdemeanor the willful failure of any carrier to file and publish the tariffs and rates as required by the Act and to strictly observe such tariffs until changed according to law.

Such are the requirements and prohibitions with which R.T.C. was faced, first, when it filed its tariff with the Interstate Commerce Commission, and second, when it undertook the movement of the Barge PETER B and its cargo from Reserve, Louisiana, to Texas City, Texas.

---

[28] 54 Stat. 935, being 49 U.S.C. 906(c), reproduced in full in the Appendix, *infra*, p. 86.

[29] 54 Stat. 935, being 49 U.S.C. 906(d), reproduced in full in the Appendix, *infra*, p. 86.

[30] 49 U.S.C. 41, *et seq.*

R.T.C. Filed Its Tariff In Accordance With The Requirements Of Part III Of The Interstate Commerce Act, And It Became Effective. Thereafter It Bound Both Shippers And R.T.C. "With The Force Of Law".

Subject to the requirements hereinabove specified, R.T.C. filed with the Interstate Commerce Commission its Tariff I.C.C. No. A-9, which was then published, printed and kept open to public inspection. In that tariff R.T.C. named a rate for the transportation of molasses laden by the shipper in its own barge from Reserve, Louisiana, to Texas City, Texas. Necessarily, in determining that rate R.T.C. both had to take into consideration the practices and regulations which would in anywise change, affect, or determine any part or the aggregate of such a rate or charge or the value of the service rendered to the shipper, and to embody such practices and regulations in the tariff.

It is obvious that in constructing any rate the regulated carrier by water must include its out-of-pocket costs to be incurred in performing the service, its overhead, and its profit; otherwise, the rate would be unreasonably low and would result in a discrimination against other methods of transportation. One out-of-pocket item of cost—and a large one—is the cost of insuring the shipment against the risks of loss or damage. Where the risk of such loss or damage is to be borne by the carrier, necessarily the rate has to be increased by the charge for the insurance premium, and this is an amount which is omitted from the rate where the shipper assumes the risk of loss and damage.

In this instance R.T.C. constructed a rate which placed upon the shipper the risk of loss and damage and

accordingly a rate which was lower than would have been necessary had the carrier insured. In addition, the carrier found itself faced with a special problem in all instances where the shipper furnished its own barge already loaded: first, the inability properly to inspect the barge, and secondly, the inability to repair any damage other than a patent minor flaw. A standard 11-foot barge loaded by a shipper and delivered to a carrier is loaded to an average depth of 9½ feet, which means that 9½ feet of the hull of the barge are under water and not subject to inspection. Cargo compartments are filled with cargo, and the rake and other spaces not occupied by cargo are usually not gas-free so they cannot be entered for inspection. Accordingly, a carrier by water who takes a shipper's barge loaded by the shipper with cargo must take it in an "as is" condition and must rely upon the responsibility of the shipper to furnish a barge seaworthy both as to condition and as to stowage of cargo.

Accordingly, in publishing its Tariff I.C.C. No. A-9, R.T.C. embodied therein, for moving molasses from Reserve, Louisiana, to Texas City, Texas, when loaded by the shipper in shipper's barge, a rate conditioned on the shipper supplying and loading the barge, assuming the risk of loss and damage, and guaranteeing the seaworthiness of the barge and proper stowage of the cargo therein, and, as required, stated those practices as regulations in the tariff; first, that the barges and cargoes would be handled at owner's risk only, and second, that the presentation of the barge by the shipper to the carrier for movement would constitute a guarantee that the barge was seaworthy and the barge and cargo were in suitable condition for the prospective voyage.[31]

[31] These two provisions are reproduced *infra*, Appendix, p. 92; and see footnote No. 12 *supra* p. 5.

Under the provisions of the Act, upon the presentation of this tariff to the Commission it might have permitted the filed tariff to become effective, or it might have suspended it temporarily and either on its own motion or on the motion of an aggrieved party inquired into the reasonableness of the rates, charges and practices, and might have required the carrier to render either an additional service to the one proposed, or an entirely different service, with the rate and attendant practices prescribed by the Commission. The Commission permitted the tariff to become effective, and it thereafter remained effective without protest during the entire period when R.T.C. performed for Southwestern the service which is the basis of this litigation. The well-settled rule has frequently been pronounced by this Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520, 59 S. Ct. 612, 614; *Crancer v. Lowden*, 315 U.S. 631, 635, 62 S. Ct. 763, 765.

The Court Of Appeals Recognized The Principle That Until Changed Tariffs Bind Both Carriers And Shippers With The Force Of Law, Held Correctly That The Interstate Commerce Commission Has The Primary Jurisdiction To Consider Tariff Changes And Remanded The Case To The District Court To Give Southwestern An Opportunity To Attack The Reasonableness Of The Tariff Before The Interstate Commerce Commission.

The Court of Appeals unequivocally recognized the principle that "Until changed, tariffs bind both carriers and shippers with the force of law". Holding that the Interstate Commerce Commission is vested with primary

jurisdiction to effect changes in tariffs where those changes require specialized competence and administrative discretion and involve issues of transportation policy, the Court of Appeals remanded this case to the District Court with instructions to give effect to R.T.C.'s tariff provisions unless Southwestern, within a reasonable time, files its application with the Interstate Commerce Commission to effect a change in the tariff.

We submit that the Court of Appeals could not have done otherwise. First, it is obvious, as stated by that Court in its opinion, that for "reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, *et seq.*, Congress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce". The second, and even more cogent reason is found in Your Honors' jurisprudence that when tariffs involve issues of transportation policy they ought not to be ignored, set aside, or otherwise set for naught except after consideration by the Interstate Commerce Commission in the interest of a uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act. Your Honors' latest pronunciation on the subject will be found in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S. Ct. 161. That was a suit by the United States against a carrier to recover an alleged overpayment of freight said to have arisen from the improper classification of the shipment, so that the question involved was whether the correctness of that classification was for determination by the Courts or by the Interstate Commerce Commission. Remarking that,

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case

> the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation,"

Your Honors, reviewing the jurisprudence, held that in that case there was required an intimate knowledge of the reasons why different classifications had been set by the Interstate Commerce Commission, and therefore the determination of the correctness of the classification should be referred to the Commission, saying,

> "A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially."

In reviewing the jurisprudence on this question Your Honors referred first to the old case of *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 27 S. Ct. 350, in which emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions, and pointed out that more recently the expert and specialized knowledge of the agencies involved has been particularly stressed, citing *Far East Conference v. United States*, 342 U.S. 570, 72 S. Ct. 492, and remarking that the two factors are part of the same principle,

> " 'now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though

> the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' Id. 342 U.S. at pages 574-575, 72 S. Ct. at page 494."

Another case illustrative of the primary jurisdiction which is accorded the Interstate Commerce Commission in tariff matters is *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U.S. 422, 60 S. Ct. 325, and its subsequent appearance *sub nom. El Dorado Oil Works v. United States*, 328 U.S. 12, 66 S. Ct. 843. This litigation is particularly pertinent here because it involves the use of freight cars not owned by railroads but furnished by shippers, which is a situation comparable to the furnishing of a barge by a shipper. It should be here noted that Section 314 of Part III[32] authorizes a shipper to furnish an instrumentality to be used in the transportation service. Section 314 of Part III is comparable to Section 15(13) of Part I of the Interstate Commerce Act relative to rail carriers, which was under consideration in *General American Tank Car Corp.—El Dorado T. Co.* Your Honors there held that freight cars are "facilities" of transportation, so by analogy it seems clear that a barge is an "instrumentality" used in transportation which can be furnished by a shipper.

In *General American Tank Car Corp.—El Dorado*

---

[32] 54 Stat. 945, being 49 U.S.C. 914, reproduced in the Appendix, *infra*, p. 87.

T. Co. the shipper sued the owner of tank cars leased to the shipper to recover the difference, which owner had retained, between rentals due under the lease and a mileage allowance made for the use of the cars. Your Honors held that this involved an administrative problem for the Interstate Commerce Commission of determining the lawfulness and reasonableness of the allowance made and that the Court should hold the suit in abeyance pending the conclusion of appropriate administrative proceedings. This was done, and proceedings were taken before the Interstate Commerce Commission which determined the issues involved. This determination was attacked subsequently in *El Dorado Oil Works—United States*, wherein the El Dorado Oil Works had filed a complaint in the District Court challenging the action taken by the Interstate Commerce Commission allegedly pursuant to instructions contained in Your Honors' opinion in *General American Tank Car Corp.—El Dorado T. Co.* The Court reaffirmed the Interstate Commerce Commission's jurisdiction of the matters involved.

It is obvious here that it will require an administrative proceeding before the Interstate Commerce Commission to determine the reasonableness of the rate which R.T.C. had fixed for the carriage of molasses based on the shipper's furnishing and loading the barge, assuming the risk of loss and damage, and warranting the seaworthiness of the barge and the propriety of the stowage of the cargo therein. In such an administrative proceeding there will have to be ascertained the out-of-pocket costs of performing the transportation service, including the cost of insuring the risk of loss and damage, the carrier's overhead and the reasonableness of the profit which resulted from the published rate. In no other way can the carrier's tariff be determined to have been unreasonable and set aside, and unless and until it be set aside it

constitutes the law between the parties. Accordingly, we submit that the Fifth Circuit properly disposed of this case by remanding it to the District Court with instructions there to give effect to R.T.C.'s tariff unless and until it be changed in a proper administrative proceeding initiated before the Interstate Commerce Commission by Southwestern.

It Is Not Against Public Policy For A Carrier By Water To Exculpate Itself From Liability For Loss And Damage Which Results From The Negligent Management Of A Vessel.

The Court of Appeals remarked in its opinion that there is no general public policy forbidding the exculpation of water carriers from their negligence. This is a considerably broader assertion than is required for the determination of this case. What we are here contending is that there is no general public policy forbidding the exculpation of water carriers from liability for loss or damage occurring as a result of negligent acts of their employees in the management of vessels, as distinguished from care and custody of cargo.[33]

The public policy is found in the acts of the Congress of the United States. Illustrative of its statement that there is no general public policy forbidding the exculpation of water carriers from their negligence, the Court

---

[33] In this connection, however, it must not be overlooked that by Revised Statute 4282, which is 46 U.S.C. 182, commonly known as the "Fire Statute", reproduced in the Appendix *infra* page 88, Congress exonerated a water carrier from liability for loss or damage to cargo occasioned by fire "happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner", thereby exonerating a ship-owner from liability for fire occasioned without the owner's actual fault or privity. This exculpation is reiterated in the Carriage of Goods by Sea Act, being 46 U.S.C. 1304(2)(b), hereinafter referred to, which expressly exculpates a carrier from responsibility for loss or damage occurring from "fire, unless caused by the actual fault or privity of the carrier".

of Appeals cited Section 3 of the Harter Act.[34] This act, enacted by the Congress of the United States in 1893, exculpates a vessel owner, provided he has used due diligence to furnish a seaworthy vessel, from liability for loss and damage to cargo "resulting from faults or errors in navigation or in the management of the vessel".

Parenthetically, neither Section 1 nor Section 2 of the Harter Act[35] are material to consideration of this case. Section 1 has no reference to the management of a vessel, but only to care and custody of cargo, which are not involved in this litigation. Section 2 deals with the obligations of the owner of a vessel transporting merchandise or property to exercise due diligence to equip, man, provision and outfit the vessel properly and to make it seaworthy and capable of performing its intended voyage and the obligations of the master, officers, agents, or servants with regard to stowage of cargo. R.T.C. was not the owner of the Barge PETER B and did not stow the cargo therein, but on the contrary relied on the guarantee of the owner that the barge was seaworthy and that the cargo was properly stowed therein.

The public policy, as evidenced by Section 3 of the Harter Act in 1893 was even further liberalized in 1936 by Congress by the Carriage of Goods by Sea Act.[36] This liberalization of policy is evidenced by the elimination of the requirement that as a condition to exculpation the carrier must have used due diligence to make his vessel seaworthy. While the Act requires a carrier to furnish a seaworthy vessel, it does not destroy any exculpative right where the unseaworthiness does not contribute to

---

[34] 27 Stat. 445, being 46 U.S.C. 192, reproduced in the Appendix, *infra*, p. 89.

[35] 27 Stat. 445, being respectively 46 U.S.C. 190 and 46 U.S.C. 191, reproduced in the Appendix *infra* p. 88 *ff*.

[36] 49 Stat. 1208, being 46 U.S.C. 1300, *et seq*.

the loss or damage for which exculpation is sought.[37]

The second sub-section of Section 4 of the Carriage of Goods by Sea Act[38] provides that neither the carrier nor the ship shall be responsible for loss or damage arising from an act of neglect or default of the master, mariners or pilot, or the servants of the carrier in the navigation or the management of the ship.[39]

We submit that these Acts of Congress evidence that there is no general public policy which forbids the exculpation of water carriers from liability for loss or damage resulting from negligence of their employees in the management of a vessel.

The Bisso Case Does Not In Any Way Affect The Principles Pronounced By The Court Of Appeals In Its Opinion And For Which We Are Here Contending.

The petitioner, contending that the exculpatory clauses embodied in R.T.C.'s tariff are invalid *per se*, cites two cases in support of that argument, the first being *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629.[40]

Whether or not the *Bisso* Case, which has been severely criticized in many quarters, is correct and will be adhered to by this Court if and when the questions therein involved are again presented to it, we do not

---

[37] Section 1 of the Carriage of Goods by Sea Act, 49 Stat. 1210, being 46 U.S.C. 1304, reproduced in the Appendix, *infra*, p. 90.

[38] 49 Stat. 1210, being 46 U.S.C. 1304(2), reproduced in the Appendix, *infra*, p. 90.

[39] Qualified, of course, by Section 1, which would deny such exculpation if the loss or damage resulted from unseaworthiness.

[40] The second being *Cornell Steamboat Company v. United States*, 321 U.S. 634, 64 S. Ct. 768, hereinafter discussed.

here discuss.[41] Suffice it to say that we contend that there is nothing in the *Bisso* Case contrary to the principles which we are here contending for.

The differentiation between this case and the *Bisso* Case contained in the opinion of the Fifth Circuit is so complete and apposite that we hesitate to enlarge on it. However, we do point out:

The rationale of the *Bisso* Case does not exist here. The *Bisso* Case was a case of private towage in which the rate and the practices of the tower depended entirely upon the result of bargaining between the tow and the tower. This factor seems to have impressed greatly the organ of the majority of the Court, for he points out[42] that "increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions". There follows an example drawn from the English jurisprudence of what he deems to have been the unfortunate result of an exculpatory clause in a towage contract, permitted by the English law.

Of course, no such rationale exists here. The fact

[41] It is noteworthy that in the *Bisso* Case, decided by a divided Court of 5 to 3 (Mr. Justice Harlan took no part in the consideration and determination of the case), one of the majority, Mr. Justice Douglas, concurring, prefaces his concurrence with the remark, "I do not think we know enough about the economics and organization of this business to change the established rule of The Steamer Syracuse, 12 Wall. 167, 171, 20 L. Ed. 382, and The Wash Gray, 277 U.S. 66, 73, 48 S. Ct. 459, 460, 72 L. Ed. 787, that a tug may not contract against her own negligence". Perhaps upon another presentation of this question to the Supreme Court a record will have been made which will show conclusively that, as remarked by Mr. Justice Frankfurter in his dissenting opinion (349 U.S. 118, 119, 75 S. Ct. 647), unless Your Honors are prepared to forbid the tug to insure against losses or liabilities resulting from its negligence "then the question ultimately is whether public policy requires that the tug, rather than the tow, shall bear the cost of insurance. Indeed, in all likelihood, the economic burden will fall upon the tow in either case". Such showing might very well influence Mr. Justice Douglas to join in formulating a different rule than that pronounced in the *Bisso* Case.

[42] 349 U.S. 91-92, 75 S. Ct. 633.

that the Interstate Commerce Commission has been charged with the duty of requiring carriers to afford affreightment and towage upon bases and at rates deemed reasonable by the Commission forbids any monopolistic practice.

As a matter of fact, the concurring and the dissenting opinions in the *Bisso* Case both constitute invitations to an investigation of the regulated towboat business to ascertain by whom—that is, by the owner of the tow or the towboat—the risk of loss and damage to the tow[redacted] and any cargo thereon should be assumed as the basis for the rate to be charged for the towage, and the amount of the rate based on such assumption. Certainly, the Interstate Commerce Commission is well-suited to conduct such an investigation extensively, exhaustively and impartially. Such an investigation has been made possible by the disposition which the Fifth Circuit has made of this case, and we respectfully submit that Your Honors should not disturb that disposition.

The Cornell Steamboat Case Does Not In Any Way Affect The Principles Pronounced By The Court Of Appeals In Its Opinion And For Which We Are Here Contending.

The second case cited by petitioner in support of its contention that the exculpatory clauses embodied in R.T.C.'s tariff are invalid *per se* is *Cornell Steamboat Company v. United States*, 321 U.S. 634, 64 S. Ct. 768. We submit that there is absolutely nothing in that decision or in the proceedings before the Interstate Commerce Commission and the United States District Court which culminated in the Supreme Court's decision, which is in any way contrary to the principles for which we are here contending. All that was decided in that liti-

gation was that a tower which held itself out to tow for the public under certain circumstances would be held to be a common carrier subject to the regulation of Part III of the Interstate Commerce Act. That was the sole issue that was before Your Honors in that case. True, in your opinion in that case Your Honors referred to Section 320(d) of Part III of the Interstate Commerce Act,[43] which provides that nothing in Part III shall be construed to affect the liability of vessels and their owners for loss or damage, but, as remarked by the Fifth Circuit in its opinion, with regard to the authority of the Interstate Commerce Commission to permit the parties by their contracts of carriage approved by the Commission to fix their respective rights and liabilities:

> "Nor do we think that anything in Section 920(d) of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities." [44]

Exculpation From Liability Is One Of The Matters With Which The Interstate Commerce Commission May Deal In Approving Rates, Charges And Services Of Carriers.

Lastly, but certainly not least, we submit that exculpation of a water carrier from liability for loss and damage resulting from the management of a vessel as a factor in fixing the level of its rate is one of the

---

[43] 54 Stat. 950, being 49 U.S.C. 920(d), reproduced in the Appendix *infra*, p. 88.

[44] Appendix, *infra* p. 81.

matters which Part III of the Interstate Commerce Act has placed within the purview of the Interstate Commerce Commission as incident to approving rates, charges and services of the carriers whose activities it has the duty to regulate. There is no limitation in Part III of the Interstate Commerce Act on the authority of the Interstate Commerce Commission in devising and controlling a regulatory scheme over the use of water carriers in foreign and domestic commerce, and in the absence of such a specific limitation in the Act of Congress we submit that the Courts should not legislate one.

We therefore submit that the decision of the United States Court of Appeals for the Fifth Circuit correctly disposes of this case and that Your Honors should affirm that decision.

II.

IN THE EVENT THE DECREE OF THE COURT OF APPEALS BE NOT AFFIRMED, THEN THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR FURTHER PROCEEDINGS

In the event that Your Honors determine adversely to the respondent the one question decided by the Court of Appeals, i.e., that the exculpatory provisions of R.T.C.'s tariff should be enforced unless and until they are declared invalid by the Interstate Commerce Commission, then we submit that Your Honors should remand this case to the Court of Appeals for its determination of the other issues which respondent presented to that Court on its appeal. None of these issues has been passed on or considered by the Court of Appeals, but on the contrary they have been specially reserved, as appears from the Court of Appeals' opinion. Whether or not

after determination by the Court of Appeals any of these issues will survive for presentation to Your Honors is problematical, but in any event you will then have the benefit of the views of the Court of Appeals. Accordingly, we submit that unless the decree of the Court of Appeals be affirmed, this case should be remanded to that Court. *Brown v. Fletcher*, 237 U.S. 583, 35 S. Ct. 750; *Lutcher & Moore Lumber Co. v. Knight*, 217 U.S. 257, 267, 268, 30 S. Ct. 505, 509, 510; *United States v. Ballard*, 322 U.S. 78, 88, 64 S. Ct. 882, 887.

III.

IF YOUR HONORS CONSIDER ANY ISSUE WHICH HAS NOT BEEN DETERMINED BY THE COURT OF APPEALS, THEN IT IS OUR POSITION THAT THE DECREE OF THE DISTRICT COURT IS CLEARLY ERRONEOUS

In the event that Your Honors reverse the Court of Appeals and do not remand this case to that Court for further consideration of the issues which were before it on respondent's appeal which were not determined by that Court, then we assume that Your Honors necessarily will consider this case on its merits. In that event, it is our contention that the decree of the District Court is clearly erroneous. Our assignments of error to the decree of the District Court will be found in the Record at page 258. Of these assignments we discuss here assignments No. 1 and 2.[45]

---

[45] Assignments No. 3 and 4 are covered in Point I of our Argument: "The Decree of The Court Of Appeals Is Correct."

First Assignment Of Error

The [District] Court Erred In Holding That The Libellant, Southwestern Sugar And Molasses Company (Inc.), Had Any Interest In The Barge PETER B Which Entitled It To Maintain A Libel For Damage To The Barge

The evidence in the District Court demonstrates that the Barge PETER B when built was known as ABL-109.

By a bill of sale [46] dated September 1, 1942, Petroleum Carrier Corporation sold Barge ABL-109 to Southwestern for the sum of $10,000.00. By a bill of sale dated [47] March 29, 1944, Southwestern sold Barge ABL-109 to International Transportation Corporation, a New York corporation, for the sum of $7,500.00. By bill of sale [48] dated February 11, 1946, International Transportation Corporation sold Barge ABL-109 to Southwestern, a Texas corporation, for the sum of $7,500.00.

The movement of Barge ABL-109, or PETER B, and its sinking, on which this litigation is predicated, took place in September, 1944. Southwestern had parted with title to the barge on March 29, 1944, and did not reacquire title until February 11, 1946, so that when it sank, International Transportation Corporation was the owner of the barge. Furthermore, Mr. Frieler, Southwestern's Texas City Terminal Manager, called as a witness by libellant, so testified.[49] He also testified that Southwestern operated the PETER B under a charter

---

[46] Exhibit RTC-2 sent up to this Court in the original. Attached to R.T.C's Request for Admissions, R. 39, and offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[47] Exhibit RTC-3 sent up to this Court in the original. Attached to R.T.C's Request for Admissions, R. 39, and offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[48] Exhibit RTC-4 sent up to this Court in the original. Attached to R.T.C's Request for Admissions, R. 39, and offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[49] R. 65.

party from International Transportation Corporation. We quote at length his testimony on direct examination with regard to the ownership and operation of Barge PETER B and Southwestern's obligation to pay for raising and repairing this barge:[50]

"Q. Did Southwestern own the PETER B?

A. Yes, sir.

Q. And did Southwestern operate the PETER B?

A. Southwestern operated the PETER B and the International Transportation Corporation owned the barge.

Q. Oh, you say Southwestern operated her and International Transportation Corporation owned her?

A. Yes, sir.

Q. Do you know on what basis Southwestern operated the PETER B?

* * * * *

[Objections and colloquy between counsel omitted.]

BY MR. VARIAN:

Q. Do you understand the question? On what basis did Southwestern operate the vessel?

A. Southwestern paid all the keep-up [sic] of the repairs, painting and other expenses and the International Transportation Company received so much money. How much I don't know.

* * * * *

[Testimony with regard to the relation of Southwestern to International omitted.]

Q. Now did I understand you to say that Southwestern paid International some sum of mon-

[50] R. 65 *ff.*

cargo in them, and he never looked in the cargo tanks. Furthermore, we submit that if both the No. 1 and No. 2 forward cargo tanks had filled up with water this would not have been as heavy as the molasses that they were designed to carry, and that in itself could not have caused the barge to sink. The record is replete with such testimony and in fact the only competent testimony in this case is to that effect.

Frieler himself knew that water running into No. 2 cargo tank from a hole in the side plating would not affect the barge, because in a letter that he wrote to Mr. Kaplan,[101] Frieler said:

> "The Barge is on its way to Texas City. She left New Orleans at five in the morning on Monday. On Sunday I went back to Reserve and asked the watchman if the Barge was on even keel when she left on Sunday morning at 6. He confirmed that the Barge was level. During the night enough water must have run into the tank to be even with the water-line; therefore the Barge will not turn over. I will not unload her until the surveyors has [sic] made an inspection."

Captain Lambdin, Southwestern's own surveyor, had this to say in his report of survey:[102]

> "CONCLUSION:
>
> "The fact that the barge made the passage from Reserve, La., to Texas City, Texas, safely disproves any theory that the barge was unseaworthy at the beginning of the voyage. When the barge was converted to a bulk carrier the hull arrangements were such as to provide all of the reserve buoyancy at the after end of the barge,

[101] Exhibit R.T.C. 11, a photostat of which has been sent to this Court in the original; offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[102] Exhibit Lambdin 2, R. 214, 214; re-offered R. 159.

this reserve buoyancy being provided by a pump room, size (26'4" x 24' x 13' x 15' = 11') or 26'.333 x 18'.5 x 11' = 5358 cubic feet.

"The leak in No. 2 tank was not sufficient to have caused the sinking of the barge, as the barge would have remained afloat had No. 2 tank completely filled. It is obvious that as the No. 2 tank filled the draft forward increased until the bow draft exceeded the stern draft and the molasses cargo being heavier than water endeavored to run forward. The action set up abnormal longitudinal stresses on the bulkheads and pipe lines within the barge causing them to leak, allowing the cargo to find its way forward until all buoyancy at the forward end of the barge was overcome and the barge sank bow down in 30' of water.

"In the opinion of this undersigned surveyor the sinking of the barge was not the result of the leaking into No. 2 tank, but was due to contributory causes unforeseen and not anticipated by the charterers' representatives after the barge arrived at Texas City, Texas, September 23, 1944."

In his deposition Captain Lambdin testified[103] that when he surveyed the barge he found no evidence of a collision, of the barge having struck anything, and that the holes in the side plating in the way of No. 2 starboard tank were caused "definitely from deterioration", and then asked what in his opinion caused the barge to sink, he replied:[104]

"In my opinion, the barge sank as the result of water coming into No. 1 tank of the barge and leaking from there into the rake of the barge slowly, which caused the barge to go down by the head; and then as the barge went down by the head, the cargo in the barge had a tendency to

[103] R. 208-209.
[104] R. 209.

run forward through the ullage in the tanks and increased the weight at the forward end; and with the bulkheads in the barge leaking, the cargo eventually kept creeping forward, and that, along with the small amount of water coming in through these pinholes forward, killed all the buoyancy in the forward end of the barge and the barge set up on its head and went down."

Asked [105] if he had included that opinion in his survey report, he replied in the affirmative; and asked if he had expressed that opinion to the Southwestern Sugar and Molasses Company, he also replied in the affirmative and further testified that he had expressed that opinion at a meeting which had been attended by Johnny Dee as RTC's representative and "Mr. Kaplan, the owner of the Southwestern Sugar and Molasses Company, Mr. Julius Gissel, of Collins and Gissel, who was the agent for the Southwestern Sugar and Molasses Company, and myself." That when he had told Mr. Kaplan [106] "I thought the tugboat had nothing to do with the sinking of the barge", Mr. Kaplan had replied: "Then I guess that lets the towboat company out", and, thereupon, Mr. Dee said: [107] "There is no use of me staying here any longer", and Mr. Dee left

Captain Wynne, who was Southwestern's cargo surveyor, in his report of survey [108] had this to say:

"At 8 A.M. on October 3rd. I carefully examined the condition of the Barge, in so far as possible with the barge afloat, and found that the holding down lugs on the manhole on the forward dry rake were corroded so badly that it would

---

[105] R. 209.
[106] R. 210.
[107] R. 210.
[108] Wynne Exhibit 1 sent to this Court in the original, footnote 88 *supra*, p. 42.

have been impossible to have made this manhole watertight as the nuts could not be worked on the bolts and the cover screwed down tight.

"It was also found that the gaskets in all of the manholes leading into all of the compartments were in a very badly deteriorated condition; none of the manholes being in such condition that they could be fastened down and made water-tight.

"The valve stems leading up through the deck were not packed which allowed water to enter the compartments from these sources quite freely.

"The barge was placed on the drydock at the Port Houston Iron Works, Houston, Texas, on October 11, 1944, after which I examined the bottom of the barge and other under-water parts and found that the third plate forward on the starboard side second strake from the deck, was very badly wasted; numerous holes wasted in the plate, the diameter of these holes ranging from ½" to 2". There was no evidence of the barge having been in a collision.

"In view of all of the above it is the opinion of the undersigned Surveyor that the cause of this barge sinking and the subsequent loss to the cargo was due to unseaworthiness of the barge at the time of sailing from Reserve, La., on September 16, 1944. This unseaworthiness being due to the above mentioned plate being badly wasted, allowing water to gradually enter the forward cargo compartments of the Barge to such an extent that during the night of September 23rd. or the early morning hours of September 24th. while the barge was lying at Texas City water came over the deck of the barge, entering the dry rake compartment forward, and in turn subsequently entering through the deck openings along the barge until the barge had shipped sufficient water to cause the forward end to sink."

Before closing our discussion on this point, we reiterate what we have heretofore said to the Court, that Captain Wynne and Captain Lambdin, though they represented Southwestern and not RTC, were all called by RTC as its witnesses. There were two other surveyors who represented the Barge PETER B interests, neither of whom have been called as witnesses by Southwestern. They are Captain Colbury, who represented International Transportation Company, the owner of the PETER B, and whose survey report was introduced in evidence and sent to this Court in the original, which is referred to *supra*, and Captain A. D. Whittaker, the surveyor for the hull underwriters.[109]

We have presented here a situation where both Southwestern's cargo surveyor, Captain Wynne, and their hull surveyor, Captain Lambdin, ascribe the sinking of the Barge PETER B to causes over which RTC had absolutely no control. Captain Wynne ascribes it to inherent unseaworthiness of the barge, and while Captain Lambdin says the barge was "seaworthy" when it left Reserve, the condition which he described constitutes at law inherent unseaworthiness, though Captain Lambdin, not being a lawyer, did not realize it. The theories on which RTC's liability has been predicated were developed in the offices of Southwestern's eminent proctors, and we respectfully submit that those theories are wholly specious and are not supported at all by any evidence in the case.

The failure of the PETER B interests to call Whittaker and Colbury as witnesses raises the inference that

[109] See Wynne Exhibit 1, footnote 88 *supra*, p. 42, sent to this Court in the original, p. 5, reciting that "on September 26, 1944, at 2 P.M., Mr. Whittaker, surveyor for the United States Salvage Association, representing the hull underwriters, arrived on board * * * ", and the Lambdin survey report, Exhibit Lambdin 2, footnote 102 *supra*, p. 46, sent to this Court in the original, reciting that Whittaker and Colbury were present at the survey of the barge after it had been hauled out.

if they had been called their testimony would have been unfavorable to International and/or Southwestern. Such is the well settled jurisprudence. *The New York*, 175 U.S. 187, 20 S. Ct. 67; *Coyle Lines v. U. S.* (C.A. 5, 1952), 195 F. 2d 737, 1952 A.M.C. 715.[11] We submit that it must be assumed that Southwestern's proctors have no testimony which supports their theories.

We urge emphatically that all of the evidence in the case is indisputably to the effect that the Barge PETER B sank from unseaworthiness and that on the authority of *Stall & McDermott v. Southern Cross, supra*, this places the responsibility for the sinking on the barge owner and exonerates the tower. Accordingly, we submit that RTC's libel should be dismissed on that ground; however, alternatively, and in the alternative only and in the event that Your Honors should reach the conclusion that RTC was guilty of any negligence, then we submit that in any event Southwestern's libel should be dismissed because it had the last clear chance to prevent the Barge PETER B from sinking.

Southwestern Had The Last Clear Chance To Prevent The Barge PETER B From Sinking

While we emphatically deny that RTC was guilty of negligent towage and insist that RTC had discharged its entire obligation to the Barge PETER B and its cargo when it tied up the barge in apparent good order and condition and with its cargo intact, and that the sinking of the barge was due to causes for which RTC cannot be blamed, alternatively we urge that in any event Southwestern had the last clear chance to prevent the

[11] Followed by the District Courts in the Fifth Circuit in *Lykes Bros. S. S. Co. v. Waterman* (D.C. E.D. La. 1956), 138 F. Supp. 725, 1956 A.M.C. 1194; *Lone Star Bag & Bagging Co. v. Florida Sword* (D.C.S.D. Tex., 1956), 1956 A.M.C. 1560, pages 1563 and 1566 (two cases).

sinking of the PETER B and the loss and damages consequent thereon, and Southwestern's failure to exercise this last clear chance relieves RTC from any liability which might otherwise have existed. In this regard this litigation is squarely within the doctrine laid down by the Fifth Circuit in *Crawford v. Indian Towing Company* (C.A. 5, 1957) 240 F. 2d 308, 1957 A.M.C. 250. Here the Fifth Circuit held in no uncertain terms that notwithstanding the prior conduct of one of the parties in an occurrence which gives rise to litigation, if the other party subsequently has an opportunity so to conduct itself as to make ineffectual that prior conduct but fails to do so, that failure renders the inactive party solely liable for the occurrence and the resulting damage, citing *The Cornelius Vanderbilt* (2 Cir.) 120 F. 2d 766, 1941 A.M.C. 1245, and *The Sanday*, (2 Cir.) 122 F. 2d 325, 1941 A.M.C. 1249, and saying:[111]

> "Whether this be called an application of the doctrine of last clear chance or the rule of causation, makes little difference. Where as here, an act is negligent, but is not the proximate cause of the injury, it is merely a condition. As such it is not a basis of liability. *P. Dougherty Co. v. United States* (3 Cir.), 207 F. 2d 626."

We submit that whatever may have been the prior conduct of RTC, Southwestern had the last clear chance to prevent the sinking of the PETER B, so that any prior conduct of RTC was merely a condition and not the proximate cause of such sinking and "as such it is not a basis of liability."[112]

Let us examine Southwestern's conduct after the Barge PETER B was tied up.

---

[111] 240 F. 2d 311, 1957 A.M.C. 255.

[112] *Crawford v. Indian Towing Company, P. Dougherty Co. v. United States*, both *supra*.

The Tug DOTTIE D tied up the Barge PETER B at Texas City on Saturday, September 23, at 12:01 A.M., at the place indicated by the watchman.[113] In the District Court Southwestern made a point of the authority of the watchman to designate the place where the PETER B was to be tied up, but because we deem that immaterial we don't discuss it and base our argument solely on the knowledge of the position and condition of the barge gained thereafter by the employee in charge of Southwestern's Texas City Office, Miss Wertenberger (Mrs. White).

The first responsible Southwestern employee to learn of the presence of Barge PETER B was Garcia, whose deposition was taken by Southwestern at Texas City in the latter part of 1946.[114] Garcia was then no longer employed by Southwestern, but was on his own as a building contractor.[115] He described his duties while employed by Southwestern as warehouseman and loading and unloading tank cars and the barges, including the Barge PETER B[116] and performing maintenance work on Southwestern's various vessels, including the PETER B.

Garcia testified that when he came to work the morning that the barge arrived (Saturday), he saw the barge and "noticed that the barge was pretty low, close to the water surface" with water going over the right-hand corner of the bow of the barge and going some two or three feet on deck.[117] Asked on direct examination if anything was done at that time with respect to pumping the cargo out of the barge, Garcia replied in the negative and said that he went and notified the office of the con-

[113] R. 226.
[114] R. 168.
[115] R. 168
[116] R. 168-169.
[117] R. 170.

dition of the barge and that he didn't know why pumping the cargo out of the barge was not begun. He then testified on direct examination—and we stress the materiality and importance of this testimony—as follows: [118]

"Q. If you had received orders from the office to pump the barge out were you in position to do so?

A. Yes, sir.

Q. You were thoroughly familiar with the operation necessary to pump her out?

A. Yes, sir.

Q. Was anything done that day with respect to pumping the barge?

A. No, sir."

On cross-examination Garcia testified [119] that he had seen the barge between 7:00 and 8:00 on Saturday morning because he came to work at 7:00, and that he told Miss Wertenberger in the office the condition in which he had found the barge; that he didn't see the barge again until the next day, Sunday, around 11:00; that when he went home at noon Saturday he didn't look at the barge and on his way home hadn't passed close enough to the barge to see it. When Garcia next saw the PETER B, on Sunday, the barge's bow was sunk. [120]

In this Garcia is corroborated by Miss Wertenberger (Mrs. White), whom Frieler had left in charge of Southwestern's Texas City office. Miss Wertenberger testified: [121]

"Q. You could have unloaded it [the barge] had you had instructions to do so? You had the

[118] R. 171.
[119] R. 174.
[120] R. 171.
[121] R. 134.

facilities to pump it out then and there on Saturday?

A. That's right."

Now let's see why Miss Wertenberger didn't order the cargo pumped out of the Barge PETER B:

We submit that it was because she had had absolutely no prior experience whatsoever with any marine equipment, being only a clerical employee, and because before he left Texas City Frieler had given her peremptory instructions that the Barge PETER B was not to be discharged either until he had returned or until Captain Wynne had surveyed the barge. Due to her inexperience, Miss Wertenberger did not realize that the safety of the barge and its cargo was paramount to those instructions, and therefore she let the barge sit unattended until it sank the next day (Sunday). No other conclusion is possible from the testimony, which was as follows:

Frieler testified [122] that Miss Wertenberger was "more or less my right hand man" and that when he was out of town or not in the plant she would take telephone calls and write memoranda of what happened; that she handled the bookkeeping department, took care of the invoicing and relieved him of lots of details of his work; but that she had no familiarity with barge equipment or marine equipment, being only a clerical employee.

Frieler testified that Captain Wynne, the cargo surveyor, had telephoned him about the Barge PETER B as early as Tuesday, September 19, though he didn't know how Wynne knew that the barge had sprung a leak; [123] that he advised Wynne of the details, though at that time he and Wynne had no discussion as to the dis-

[122] R. 84.
[123] R. 84.

charging of the cargo from the barge. Frieler and Wynne also must have had a telephone conversation on Wednesday, September 20, about which Frieler didn't testify, in which they did discuss discharging the barge, because on September 21 Wynne wrote Southwestern, for Frieler's attention, a letter.[124] in which he said:

> "Confirming our telephone conversation of yesterday [September 20], please be advised that I wish to attend on board the barge PETER B. prior to that barge being discharged at Texas City. Please give me as much advance notice as possible in order that I may attend without causing you any inconvenience."

Frieler then testified that he received a telegram from Mr. Kaplan to proceed to McAllen, Texas, and actually left Texas City on Thursday, September 21; that before he left he telephoned Hinkle at RTC, Houston and asked him for a report on the Barge PETER B and Hinkle told him he hadn't heard anything; that Wynne contacted him before noon on Thursday[125] and asked him when the Barge PETER B was coming in and he replied that he didn't know, and Wynne told him that he would come to Texas City and have a discussion with him about the PETER B,[126] but that nothing was then said about discharging the barge;[127] that Wynne came in his office about 4:00 on Thursday afternoon, and while they were sitting in Frieler's office Wynne told Frieler that he "must not unload—that we must not unload the barge until he [Wynne] had seen her and had taken samples of the tanks"; that since he [Frieler] "had already packed everything and was leaving to

---

[124] Wynne Exhibit 3, attached to answers to interrogatories and reproduced in the transcript R. 59-60, offered jointly by Southwestern and R.T.C. R. 160-161.

[125] R. 86.

[126] R. 86.

[127] R. 86.

McAllen, I took Mr. Wynne to Miss Wertenberger's desk and I said, 'Now Miss Wertenberger, these are the instructions of Mr. Wynne; that he don't want us to unload the barge until he has seen it and taken sample of it.'" [128]

Frieler testified that he then left for Corpus Christi, having advised Miss Wertenberger where he could be reached there, and the next thing he knew about the Barge PETER B was when he was on his way back on Sunday, when he arrived in Houston close to 3:00 P.M. and was told the barge was in difficulty. By his testimony Frieler was making as light as he could of his conduct. A reference to a contemporaneous memorandum that Frieler made on September 21, 1944, and to a letter which he wrote to Mr. Kaplan on September 26, 1944, demonstrate just what Frieler had in mind better than does his testimony given in Court thirteen years later.

On September 21, 1944, Frieler wrote a memorandum [129] in which he said that in his conference with Captain Wynne in his (Frieler's) office "We came to an understanding to unload the barge on Monday on my return from McAllen, unless something else would come up", and concluded his memorandum with a quotation of the instructions that he left Miss Wertenberger upon his departure from McAllen: "Don't unload Barge until two surveyors, one for molasses and one for Barge, has seen damage. If you have their permit you can go ahead and unload."

So it appears that Frieler's instructions to Miss Wertenberger were not only not to discharge the barge

---

[128] R. 86.

[129] Exhibit Respondent 1, reproduced R. 248; offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

until Wynne had surveyed the cargo damage, but also that she should not discharge until a hull surveyor for the barge had also surveyed it. Neither Frieler nor Miss Wertenberger (on whose testimony we comment hereinafter) ever testified to anything about Frieler's instructions to Miss Wertenberger that the barge was not to be discharged until the hull surveyor had seen the barge.

On September 26, 1944, Frieler wrote Mr. Kaplan a letter [130] as follows, with regard to the understanding that they had reached in their conference in Frieler's office on September 21:

> "Capt. Wynne and myself came to an understanding that we would not touch the cargo till I returned from McAllen. He wanted me to make the Beaume test on the damaged Tank in order to determine if the molasses would be good enough to put into the shore tanks. I asked him to leave his home and office telephone numbers with us in order to notify him as soon as the Barge arrived."

Miss Wertenberger testified in open court on trial of this case after having reviewed the deposition which she had given previously in 1946 at Texas City,[131] eleven years before, and after having just discussed the case with libellant's proctor. She testified [132] that she was employed by Southwestern in 1942 as assistant bookkeeper and clerical worker; that she "typed up reports, the invoices and typed up the checks for the payroll" but that she didn't have anything to do with the floating equipment, its loading or discharging; that she was so employed in 1944, and that she terminated the employment in 1947. She testified that prior to this occasion,

---

[130] Exhibit Libellant 11, reproduced R. 249-250; offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[131] R. 118.

[132] R. 118.

in September, 1944, Barge PETER B had previously been discharged at Texas City at least six or eight times,[133] but that her connection with these discharges had been limited to keeping account records.[134]

This was the kind of employee that Mr. Frieler left in charge of Southwestern's Texas City office when he knew that the Barge PETER B was due to arrive any day though he didn't know its position, and though he knew that the barge had sprung a leak when it was loading at Reserve, and though he had left instructions that the barge wasn't to be discharged until the cargo surveyor Captain Wynne and a hull surveyor had surveyed it.

Miss Wertenberger testified that on September 23, Saturday, when she came to work that morning she was told that the Barge PETER B had arrived.[135] She testified[136] that Joe Garcia told her the barge had arrived and "he said there was water coming in up over one corner of it" and she "went down to the docks to look at it and that's what was happening; there was water coming over one corner".

Miss Wertenberger then replied affirmatively to the question by Southwestern's proctor whether Southwestern Terminal had berthing facilities for barges and, asked how the barge had been placed in the slip, testified that the "engine room"[137] was to the inside with the bow of the barge toward the channel.[138] Miss Wertenberger was then asked what the conditions were when she went down to look at the barge, and she replied: "Well that

[133] R. 119.
[134] R. 119.
[135] R. 119.
[136] R. 120.
[137] Which was in the aft rake compartment of the barge.
[138] R. 120.

corner was down even with the water so that when the waves came, it splashed up over that corner, up about a foot or maybe a foot and a half",[139] but that the other corner was out of the water "a foot or a foot and a half, at least";[140] that Joe Garcia was with her when she went to inspect the barge, and after she had inspected it she went back to the office and placed calls for Captain Wynne and for Mr. Stovell of RTC.[141] Asked by Southwestern's proctor who Captain Wynne was, she stated that she didn't know, but before Frieler had left to go to McAllen, Captain Wynne had called at his office and they had told her that as soon as the barge arrived she was to call Captain Wynne "and let him know so that he could come down there to inspect it".[142]

Miss Wertenberger then testified[143] that she knew that there had been trouble when they loaded the barge but she didn't know what it was. She was then asked[144] about the nature of the conversation that she and Captain Wynne and Mr. Frieler had about the barge, "that is, as to when it was to be looked at; surveyed?" She replied:[145]

> "Well he was supposed to come down as soon as it was in. I was to notify him as soon as it came and docked and my understanding was that he was to come down to see the barge as soon as it arrived—as soon as I notified him."

Southwestern's proctor in his examination then switched back to the happenings of Saturday, September 23.

---

139 R. 121.
140 R. 121.
141 R. 121.
142 R. 122.
143 R. 122.
144 R. 122.
145 R. 122.

Miss Wertenberger testified [146] that she telephoned Mr. Stovall and Captain Wynne and she reached Stovall first on the telephone.[147] Repeating her version of her conversation with him, Miss Wertenberger testified that she told him that the barge was in, that she had been down there to look at it and the water was coming up over a corner about a foot or a foot and a half, and that he told her to wait a minute, that he thought the captain of the DOTTIE D was in the office; that she supposed he talked to the captain for a few minutes and then he told her the captain had said the barge was in that condition when he left it "at our docks in Texas City" and was also in that condition when he picked it up at Port Arthur; that he assured her that there wasn't any danger in it; and that she told him that she had been left in charge and didn't want anything to happen and certainly didn't want it to sink, and he sort of laughed and assured her that there wasn't any danger of that; that they did not discuss whether or not the rakes of the barge had been inspected and were dry, but he assured her that there wasn't anything to be alarmed about; and that was between 8:30 and 9:00 in the morning.[148]

This is a complete resume of Miss Wertenberger's version of her conversation with Mr. Stovall. In this connection we call attention to the District Court's finding of fact No. XVI, wherein the Court states: "A clerical employee of Southwestern telephoned River's [RTC'S] Houston office, notified them of the condition of the barge, and requested that a tug be sent to pump the barge or otherwise care for it". There isn't a scintilla

[146] R. 123.

[147] On cross-examination Miss Wertenberger testified that she placed the call to Captain Wynne first but just accidentally Stovall's call came through first. R. 133.

[148] R. 123-124.

of evidence that Miss Wertenberger (or anyone else) ever requested RTC to send a tug "to pump the barge or otherwise care for it". That again is purely a figment of Southwestern's proctor's imagination embodied in its proposed findings of fact and obviously inadvertently adopted by the District Judge.

Miss Wertenberger then testified that she reached Captain Wynne on the telephone between 9:00 and 10:00 in the morning. In reply to the question whether or not she had a conversation with him about the barge, she testified:[149]

> "A. Yes, sir, I did. I told him that I had been down to see it and the condition it was and that I had called Mr. Stovall and told him the condition it was in and that—the same conversation I repeated to him that I had had with Mr. Stovall and he said that he wouldn't be down to see it until Monday with Mr. Frieler.
>
> Q. Did Captain Wynne seem alarmed at the fact that water was coming over or washing over the forward right hand corner of the barge?
>
> A. No, he didn't.
>
> Q. Did you tell him that was the condition was you [sic]?
>
> A. Yes, sir, I did.
>
> Q. Are you positive of that?
>
> A. Yes, sir."

Miss Wertenberger then gave as her excuse for not having telephoned Mr. Frieler that Stovall hadn't told her that the barge was in a dangerous condition,[150] and testified that she left the plant at noon without doing

---

[149] R. 124.
[150] R. 125.

anything more about the barge; she testified that she went and looked at the barge before she left and that it was in the same condition at 12:00 noon as it had been in when she first saw it at 8:00 that morning;[151] she then testified that the next she knew about it was the next morning, Sunday, at about 9:00, when she received a telephone message at home that the barge was sinking.[152]

Miss Wertenberger testified that on receipt of information that the barge was sinking she immediately went to the plant and was there a few minutes later—that is, that would be a few minutes past 9:00. She found a Miss Gonzales and the pumpman, Garcia, there when she arrived,[153] and at that time "the water was over the top clear up to the last two valves in front of the engine room". Even then she wouldn't give any orders to start pumping the barge; she testified that she went back to the office and placed calls again to Captain Wynne and Mr. Stovall. She testified she reached Stovall first and her version of the conversation,[154] was that she told him the barge was sinking and the water was up to the last two valves in front of the engine room and she didn't know what to do with it because Joe Garcia was afraid to pump the molasses in Southwestern's shore tank because it would have salt water in it; that she didn't know what to do about it and she was in a predicament. She testified further that she told him that she had placed a call to Captain Wynne but was unable to reach him[155] and he told her[156] that when your house is burning down you don't wait for the insurance man but you call the fire

[151] R. 133.
[152] R. 126.
[153] R. 126.
[154] R. 126.
[155] R. 127.
[156] R. 127.

department to put the fire out. She testified on cross-examination that Stovall also told her "to get hold of Munez Construction Company; somebody that could raise it.[157] Nevertheless, Miss Wertenberger continued to do nothing except try to reach Captain Wynne, in which she was successful at 2:00 or 2:30 in the afternoon, and he told her to start pumping molasses overboard until he could get there in order to keep the barge from completely sinking, so that's what they did,[158] and at about 3:00 Captain Wynne appeared.

On cross-examination Miss Wertenberger also testified[159] that Southwestern never had any marine employee such as a watchman whose duty it was to watch the barges and tend to their lines, slacking them and tying them up, and notifying someone if they broke loose, and that when she left the office at noon Saturday it was then her intention to let the Barge PETER B sit there until she returned to work on Monday morning, and that's what she would have done if she had not been notified that the barge was in difficulty.

The testimony that Miss Wertenberger gave on redirect examination[160] by Southwestern's proctor is most noteworthy. She testified first that in her Saturday conversation with Mr. Stovall she had told him that she was going off work at noon Saturday and that there wouldn't be anybody there until Monday morning; that Mr. Stovall knew of her unfamiliarity with floating equipment.

Secondly, she testified with regard to and gave a complete resume of her Saturday conversation with Captain Wynne. She testified[161] that she told him that the

---

157 R. 134.
158 R. 127-128.
159 R. 133.
160 R. 135 *ff.*
161 R. 136.

starboard forward corner or the right-hand forward corner of the PETER B was down and water was washing over it, but that he didn't seem alarmed about that condition; that if Captain Wynne had instructed her or recommended to her that the barge be pumped out that time it could have been done by Joe García.[162]

Thirdly, she testified that she had never seen the Barge PETER B in the same condition as it was in when she looked at it on Saturday morning.

Accepting the Frieler and Wertenberger testimony at its face value, this appears indisputably:

1. Frieler, with knowledge that the condition of the Barge PETER B was abnormal and without knowing the position of the barge, what had occurred or might occur to it during the voyage from Reserve to Texas City, or when the barge would arrive, left Texas City on other business and left in charge an employee who, however efficient she might have been as a clerical employee, admittedly knew absolutely nothing about marine equipment.

2. Captain Wynne, who had no connection with RTC, but who was Southwestern's cargo underwriters' surveyor, had instructed Southwestern not to discharge the Barge PETER B until he surveyed it, and had left instructions with Southwestern to notify him promptly on the arrival of the barge. These orders had been given Miss Wertenberger by Frieler in Captain Wynne's presence before Frieler departed, and it was Miss Wertenberger's understanding that Captain Wynne would attend the barge promptly upon its arrival.

---

[162] R. 136.

3. The alleged condition of the PETER B after its arrival was known to Garcia, Southwestern's employee charged with the duty of discharging the barge, between 7:00 and 8:00 A.M., September 23. He then knew the position and the open and apparent condition of the barge and that that condition was abnormal. He was prepared then and there to discharge the cargo had he been so instructed.

4. At 9:00 A.M. on Saturday, September 23, Miss Wertenberger was advised of the presence of the barge, its position and its then open and apparent condition. She knew that something untoward had occurred at the time the barge was loaded, and went and looked at the barge and saw that it was in what she considered an abnormal condition, but did not order the barge discharged because she considered that her instructions not to discharge the barge until it had been attended by Captain Wynne overrode considerations of the safety of the barge.

5. Miss Wertenberger testified that she then talked to Stovall, an RTC office employee, and he, after consulting with the captain of the Tug DOTTIE D, assured her that the barge was safe. However, she did not rely on this assurance, but subsequently, and approximately an hour later, talked to Captain Wynne, whom she advised of the presence and the exact condition of the barge, and Captain Wynne was either too lazy or too indifferent to come and see the barge then, but put it off until Monday.

6. With full knowledge of the position and condition of the barge, Miss Wertenberger left Southwestern's plant at noon Saturday, left no watchman or anyone else in charge, and went home, intending to let the

barge sit there until Monday morning wholly unattended.

We submit that these facts make a clear case of supervening negligence on Southwestern's part, subsequent to any possible negligence of RTC's; that RTC's tying up and leaving the barge, which did not sink until more than twenty-four hours thereafter and after Southwestern had the entire day, Saturday, to discharge the barge, could not possibly have been the proximate cause of the barge's sinking with the consequent damage and cargo loss, but was only a condition of this sinking. This is taking the most favorable and charitable view possible of Southwestern's behavior, and if we examine even cursorily the other testimony in the case which has been presented by RTC, Your Honors will find that Southwestern's behavior was not even as favorable to its case as the able proctor for Southwestern has made it appear from Frieler's and Miss Wertenberger's testimony.

First, let's see what Captain Wynne had to say about this situation. Bear in mind that he had not been employed by RTC; he had been employed by Southwestern's cargo underwriters; but Southwestern wouldn't take his testimony so RTC did so and made him their witness. He testified on May 30, 1951, almost six and a half years after this occurrence and almost six years before the case was tried. At that time, asked if he had an independent recollection of this matter, he replied, "Only vaguely", and he was unable or unwilling to recall much of what happened. Shown letters that he had written and reports that he had made, he testified that he had written them or that he had made them, but that they didn't refresh his memory. However, this excerpt from Captain Wynne's survey report dated October 13, 1944, is quite pertinent and certainly interesting:[163]

[163] Exhibit Wynne 1, sent up to this Court in the original, footnote 88 *supra*, p. 42.

"At 10 A.M. on Saturday September 23, 1944 I received a call from Mr. Frieler's Secretary advising me that the barge had arrived and that it was laying low in the water forward but that it was in a safe position, and that discharging of the barge would not commence until 8 A.M. Monday September 25, 1944, when Mr. Frieler had returned from a business trip to Corpus Christi. Mr. Frieler's Secretary further advised me that she had contacted the River Terminals Company who had informed her that the barge was no lower in the water than it had when leaving Port Arthur to continue the voyage to Texas City."

It is to be noted from this statement of Captain Wynne's that Miss Wertenberger told him that she wasn't going to unload the barge until Frieler came back and that is exactly what Stovall testified that Miss Wertenberger told him.

Stovall testified by deposition at Houston, Texas, on May 30, 1951, as a witness for RTC. He testified [164] that he was then employed as Manager of Operations of Dixie Carriers, Inc., and that in September, 1944, he had been RTC's Assistant General Agent located in Houston. Stovall testified [165] that between 8:30 and 9:00 on September 23, 1944, he received a telephone call from Miss Wertenberger, who "told me about the barge 'Peter B' which had been dropped in there by the tug 'Dottie D' apparently after midnight and said the barge seemed to be in bad shape," and he told her that he couldn't understand that because he had no such report; that it happened that the DOTTIE D's captain, Captain Allemand, was in the office at the time and he asked him what the condition of the barge had been when he tied it up at Texas City,

"and he said that the barge was okeh, that it was

[164] R. 215 *ff.*
[165] R. 216.

slightly down on the head, but that he had examined the rakes, the forward rake, and there was no water in the forward rake, and that in his opinion the barge was okeh, or he wouldn't have left it there; and he thought it was okeh, and he tied it up securely and came up to Houston.[166]

Stovall then testified[167] that he repeated Captain Allemand's conversation to Miss Wertenberger but she seemed to think the barge was in bad shape, and he told her that he "didn't see any immediate danger to the barge, and I suggested that she begin discharging the barge right away", but that she replied that "Mr. Frieler was out of the city and that she had received instructions from Mr. Frieler not to discharge the barge until he came back or Mr. Wynne came down and examined the barge." He testified further[168] that he "told her to watch the barge, and my suggestion, of course, was to get the stuff out of the barge as quickly as possible. In her mind, and she was looking at the barge and there [I] was not, if it was in bad shape, I told her there wasn't but one thing to do, that was to unload it".

Stovall denied that Miss Wertenberger told him that there was water up on deck on one corner of the barge[169] and testified that if she had told him that he would have contacted Munez Construction Company or somebody else he could get to get pumps there; that he didn't have any further conversation with her that day, but on the following day, Sunday, some time after noon Miss Wertenberger called him and was real excited and said the barge was in bad shape; he asked her if she had gotten hold of Mr. Frieler and if he had made any arrangements about the

[166] R. 216.
[167] R. 216-217.
[168] R. 217.
[169] R. 217.

discharge, to which "she gave me the same answer, that she had instructions from Mr. Frieler not to discharge the cargo until Mr. Wynne came down there, and she had not been able to get hold of Mr. Wynne." [170]

Stovall then testified that he told her that if she wasn't going to unload the barge and it was in bad shape, she had better get some pumps and pump the barge out, and, as Miss Wertenberger didn't seem to know how to go about it, he called the Munez Construction Company and arranged for all the pumps he could possibly get to pump the barge out.[171]

Stovall also testified as to his recollection of a conversation with Miss Wertenberger relative to the insurance angle, and he testified that she had "mentioned that it would be an insurance deal and that Mr. Wynne was supposed to handle those matters for Frieler or for the company", and that he had told her, "If it is an insurance matter, if your home is on fire, you certainly wouldn't wait for the insurance people to come out there. You try to put the fire out, of course." [172]

On cross-examination Mr. Stovall, asked why he hadn't gotten any pumps after the Saturday conversation with Miss Wertenberger, replied "because the Captain [of the Dottie D] said there was no water in the rake. There wouldn't have been anything to pump," [173] and testified further that the captain had told him that the bottom of the head log was just below the water, but that he had checked the rakes, there was no water in them, and the barge was in the same condition as when it left Port Arthur.[174]

---

[170] R. 217.
[171] R. 217.
[172] R. 218.
[173] R. 219.
[174] R. 220.

We submit that the testimony clearly demonstrates that the reason why Miss Wertenberger didn't discharge this barge was that she considered herself bound by Frieler's instructions not to do it unless and until he had returned or Captain Wynne had attended the barge. This, of course, does not alter the fact that Southwestern had the last clear chance to keep the barge from sinking, and the fact that it did not do so wholly releases RTC, regardless of what its prior conduct had been, and renders Southwestern wholly liable for the resulting loss, both as to barge and as to cargo. We submit that to hold otherwise would constitute a complete departure from the doctrine of *Crawford v. Indian Towing Company, supra.*

We submit that the foregoing clearly demonstrates that the District Court erred in holding that R.T.C. was guilty of negligent towage and in failing to hold that the towage was in all respects proper, that the sinking of the Barge PETER B was due to inherent unseaworthiness at the time it was taken in tow by R.T.C. at Reserve, Louisiana, or to a cause for which R.T.C. cannot be held accountable, and that in any event Southwestern had the last clear chance to avoid the sinking of the barge.

CONCLUSION

Accordingly we submit that the judgment of the Court of Appeals is correct and that it should be affirmed.

In the alternative, and if Your Honors should decree that the judgment of the Court of Appeals is incorrect, then this case should be remanded to the Court of Appeals for its further action and the determination of the various issues which respondent, as appellant therein, has submitted to the Court of Appeals but which that Court has not passed on.

Alternatively, and in the event that Your Honors should reverse the judgment of the Court of Appeals and not remand this case to that Court for further proceedings, then Your Honors should consider this case on its merits and reverse the decree of the District Court on the ground that it is clearly erroneous.

Respectfully submitted,

CARL G. STEARNS,
Bank of the Southwest Building,
Houston, Texas,

SELIM B. LEMLE,
National Bank of Commerce Building,
New Orleans, Louisiana,
Proctors for Respondent.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
Bank of the Southwest Building,
Houston, Texas,

LEMLE & KELLEHER,
National Bank of Commerce Building,
New Orleans, Louisiana,
Of Counsel.